86 1855

No. ___

FILED
MAY 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

DELTA AIR LINES, INC., and WESTERN AIR LINES, INC.,
Petitioners,

vs.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AIRLINE DIVISION, and LOCAL UNION NO. 2707, affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, and LOCAL UNION NO. 2747, affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, and AIR TRANSPORT EMPLOYEES,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

WILLIAM J. KILBERG
Counsel of Record
SCOTT A. KRUSE
H. JOSEPH GORE
GIBSON, DUNN & CRUTCHER
Suite 900
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

JAMES W. CALLISON
ROBERT S. HARKEY
WALTER A. BRILL
Law Department
Delta Air Lines, Inc.
Hartsfield Atlanta Int'l Airport
Atlanta, Georgia 30320
(404) 765-2387

Counsel for Petitioners

JEFFERSON D. KIRBY, III
MICHAEL H. CAMPBELL
PAUL D. JONES
FORD & HARRISON
600 Peachtree at the Circle Building
1275 Peachtree Street, N. E.
Atlanta, Georgia 30309
(404) 888-3800

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

1. Whether a federal court has jurisdiction to order arbitration of a contractual grievance that raises issues of employee representation which, under the Railway Labor Act, are within the exclusive jurisdiction of the National Mediation Board.

2. Whether, under the Railway Labor Act, a grievance which seeks enforcement of a successor clause in a union contract so as to require a merged airline to recognize the union as the representative of a minority group of employees after a merger raises representation issues within the exclusive jurisdiction of the National Mediation Board.

LIST OF PARTIES

The names of all parties to the proceedings in the United States Court of Appeals for the Ninth Circuit appear in the caption of the case in this Court, including Western Air Lines, Inc. It should be noted, however, that Western Air Lines, Inc. ceased to exist when it was merged into Delta Air Lines, Inc. on April 1, 1987.[1]

---

[1] Pursuant to Supreme Court Rule 28, the following is a listing of all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of Delta Air Lines, Inc.: Atlantic Southeast Airlines, Inc.; Comair, Inc.; and Gatwick Handling, Ltd.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	vi
PETITION	1
OPINIONS BELOW	2
JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
I. The Relevant Facts	2
II. The Proceedings Below	5
III. The Proceedings Before This Court	7
REASONS FOR GRANTING THE WRIT	8
I. The Decision Below Creates A Conflict Among The Courts Of Appeals Regarding The Proper Scope Of Jurisdiction Of The Federal Courts In Representation Disputes Under The Railway Labor Act	8
A. The NMB Has Exclusive Jurisdiction Of All Employee Representation Issues Under The Railway Labor Act And Every Other Court Of Appeals That Has Ruled On The Issue Has Concluded That The Courts Do Not Have Jurisdiction In Cases That Raise Questions Of Representation, Regardless Of The Context In Which They Arise	8
B. The Ninth Circuit's Decision In The Instant Case Conflicts With Every Other Appellate Decision Regarding The Effect Of Collective Bargaining Agreements On Employee Representation Issues In Airline Mergers	12

C. The Ninth Circuit Relied Upon Inapposite Authority To Reach Its Erroneous Decision 18

II. The Decision Below Directly Conflicts With The Railway Labor Act And The Statutory Authority Of The National Mediation Board 21

III. This Case Presents Issues Of National Policy Critical To The Vital Air And Rail Transportation Industries 24

CONCLUSION 26

APPENDICES A-1

A. Opinion of the Ninth Circuit, *IBTCWHA, Local Union No. 2702 v. Western Air Lines, Inc., et al.*, 813 F.2d 1359 (9th Cir. April 1, 1987) A-1

B. Order of the Ninth Circuit, *IBTCWHA, Local Union No. 2702 v. Western Air Lines, Inc., et al.*, Nos. 87-5657/5667 (9th Cir. March 31, 1987) B-1

C. Interim Order of the Ninth Circuit, *IBTCWHA, Local Union No. 2702 v. Western Air Lines, Inc., et al.*, No. 87-5657 (9th Cir. March 17, 1987) C-1

D. Interim Order of the Ninth Circuit, *Air Transport Employees v. Western Air Lines, Inc.*, No. 87-5667 (9th Cir. March 17, 1987) D-1

E. Opinion in *International Brotherhood of Teamsters, et al. v. Western Air Lines, Inc., et al.*, No. CV 86-7921 JMI (Px) (C.D. Cal. February 13, 1987) E-1

F. Opinion in *Air Transport Employees v. Western Air Lines, Inc.*, No. CV 86-8032 JMI (Bx) (C.D. Cal. February 13, 1987) F-1

G. Order of Circuit Justice Sandra Day O'Connor in *Western Air Lines, Inc., et al. v. IBTCWHA, Local Union No. 2702, et al.*, No. A-716 (April 1, 1987) G-1

H. Amended Order of Circuit Justice Sandra Day O'Connor in *Western Air Lines, Inc., et al. v. International Brotherhood of Teamsters and Air Transport Employees*, No. A-716 (April 2, 1987) H-1

I. Opinion of Circuit Justice Sandra Day O'Connor in *Western Air Lines, Inc. and Delta Air Lines, Inc. v. International Brotherhood of Teamsters and Air Transport Employees*, No. A-716 (April 2, 1987) I-1

J. Order in *Association of Flight Attendants, AFL-CIO v. Western Air Lines, Inc.*, No. 87-7040 (D.C. Cir. March 31, 1987) J-1

K. Memorandum Opinion and Order in *Association of Flight Attendants, AFL-CIO v. Western Air Lines, Inc.*, No. 87-0040 (D. D.C. February 20, 1987) K-1

L. Opinion in *International Brotherhood of Teamsters, Airline Division, et al. v. Pacific Southwest Airlines, et al.*, No. C-87-0402 MHP (N.D. Cal. March 20, 1987) L-1

M. Railway Labor Act, §§ 2, Fourth; 2, Ninth; 201; 45 U.S.C. §§ 152, Fourth; 152, Ninth; 181 ..... M-1

TABLE OF AUTHORITIES

CASES:	Page
Aircraft Mechanics Fraternal Association v. United Airlines, Inc., 406 F. Supp. 492 (N.D. Cal. 1976)	19
Air Line Employees Association v. Republic Airlines, Inc., 798 F.2d 967 (7th Cir.), *cert. denied*, ___ U.S. ___, 107 S.Ct. 458 (1986)	11,12,13,14
Air Line Pilots Association v. Texas International Airlines, Inc., 656 F.2d 16 (2d Cir. 1981)	11,14
Allegheny-Mohawk Merger Case, 59 C.A.B. 22 (1971)	5
Association of Flight Attendants, AFL-CIO v. Western Air Lines, Inc., No. 87-0040 (D. D.C. February 20, 1987)	17
Association of Flight Attendants, AFL-CIO v. Western Air Lines, Inc., No. 87-7040 (D.C. Cir. March 31, 1987)	25
Brotherhood of Railway and Steamship Clerks v. United Air Lines, Inc., 325 F.2d 576 (6th Cir. 1963), *cert. dismissed*, 379 U.S. 26 (1964)	11,16
Brotherhood of Railway and Steamship Clerks v. Non-Contract Employees, 380 U.S. 650 (1965)	23
Carpenters' Local Union No. 1478 v. Stevens, 743 F.2d 1271 (9th Cir. 1984), *cert. denied*, 471 U.S. 1015 (1985)	20
Division No. 14, Order of Railway Telegraphers v. Leighty, 298 F.2d 17 (4th Cir.), *cert. denied*, 369 U.S. 885 (1962)	11
Flight Engineers International Association v. Eastern Air Lines, Inc., 359 F.2d 303 (2d Cir. 1966)	11
Flight Engineers International Association v. Eastern Air Lines, Inc., 311 F.2d 745 (2d Cir.), *cert. denied*, 373 U.S. 924 (1963)	11

Table of Authorities Continued

	Page
General Committee of Adjustment of Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas Railroad, 320 U.S. 323 (1943)	9
General Committee of Adjustment v. Southern Pacific Co., 320 U.S. 338 (1943)	9,19
International Association of Machinists v. Northeast Airlines, Inc., 536 F.2d 975 (1st Cir.), *cert. denied*, 429 U.S. 961 (1976)	11,16,19
International Brotherhood of Teamsters, Airline Division, v. Pacific Southwest Airlines, et al., No. C87-0402 MHP (N.D. Cal. March 20, 1987)	18
International Brotherhood of Teamsters v. Texas International Airlines, Inc., 717 F.2d 157 (5th Cir. 1983)	11,14,15,22
Local Lodge No. 1266 v. Panoramic Corp., 668 F.2d 176 (7th Cir. 1981)	18
New York Central Railroad Co., 1 N.M.B. 197 (1941)	21
Northwest Airlines, Inc., 13 N.M.B. 399 (1986)	10,22
Pennsylvania Railroad Co., 1 N.M.B. 23 (1937)	9
Railway Express Agency, 4 N.M.B. 227 (1964)	21
Republic Airlines, Inc., 8 N.M.B. 49 (1980)	10,22
Ruby v. American Airlines, Inc., 323 F.2d 248 (2d Cir. 1963), *cert. denied*, 376 U.S. 913 (1964)	18,19
Seaboard Coast Line Railroad Co., 6 N.M.B. 63 (1976)	21
Summit Airlines v. Teamsters, 628 F.2d 787 (2d Cir. 1980)	14
Switchmen's Union of North America v. National Mediation Board, 320 U.S. 297 (1943)	9
Trans World Airlines, Inc./Ozark Airlines, 14 N.M.B. 218 (April 10, 1987)	10,22,23

Table of Authorities Continued

	Page
STATUTES:	
29 U.S.C. § 159(b), National Labor Relations Act § 9(b)	20
45 U.S.C. § 152 Fourth, Railway Labor Act § 2 Fourth	2,9,21
45 U.S.C. § 152 Ninth, Railway Labor Act § 2 Ninth	2,9,23
45 U.S.C. § 156, Railway Labor Act § 6	8
45 U.S.C. § 181, Railway Labor Act § 201	2,8
45 U.S.C. § 184, Railway Labor Act § 204	8
Airline Deregulation Act of 1978, Public L. No. 95-504, 92 Stat. 1705 (1978) (amending Federal Aviation Act of 1958, 49 U.S.C. §§ 1301-1542 (1982)	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. -__

DELTA AIR LINES, INC., and WESTERN AIR LINES, INC.,
Petitioners,

vs.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN and HELPERS OF AMERICA, AIRLINE DIVISION, and LOCAL UNION NO. 2707, affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, and LOCAL UNION NO. 2747, affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, and AIR TRANSPORT EMPLOYEES,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Delta Air Lines, Inc., respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit entered in the proceedings below on April 1, 1987.

OPINIONS BELOW

A copy of the opinion of the Ninth Circuit Court of Appeals, entered on April 1, 1987, which is reported at 813 F.2d 1359, is attached hereto as Appendix A. A copy of the circuit court's preliminary order of March 31, 1987, is attached hereto as Appendix B.

The opinion and judgment of the court of appeals reversed the judgments of the United States District Court for the Central District of California in two cases that were consolidated on appeal. Copies of the orders of the district court, which are unreported, are attached hereto as Appendices E and F.

JURISDICTION

The opinion and judgment of the Court of Appeals for the Ninth Circuit was rendered in this case on April 1, 1987. This Petition for a Writ of Certiorari is filed within ninety days of that date, as required by 28 U.S.C. § 2101(c) and Rule 20.2 of the Supreme Court Rules. The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The statute involved in this case is the Railway Labor Act, 45 U.S.C. §§ 151-188, and in particular §§ 152, Fourth and Ninth, and 181, copies of which are set forth in Appendix M.

STATEMENT OF THE CASE

I. The Relevant Facts

This case arises from actions filed by two labor unions, the Air Transport Employees ("ATE") and

the International Brotherhood of Teamsters and two of its locals ("IBT"), the collective bargaining representatives for some of the employees of Western Air Lines, Inc. ("Western") prior to the merger of Western into Delta Air Lines, Inc. ("Delta") on April 1, 1987. In those actions the unions sought to compel arbitration of grievances under their labor agreements with Western, alleging the breach of successor clauses in connection with the then-proposed merger of Western into Delta. The unions alleged that Western violated those clauses by failing to secure Delta's agreement to be bound by the unions' contracts after the merger was completed. Western refused to arbitrate these grievances on the grounds that they raised employee representation issues within the exclusive jurisdiction of the National Mediation Board ("NMB").

The unions were certified by the NMB as the bargaining representative for various crafts or classes of Western employees. The ATE represented the office, clerical, fleet and passenger service craft or class at Western, and the IBT represented the Western employees in separate crafts or classes consisting of mechanics and related employees, stock clerks and flight instructors. Both unions had successor provisions in their collective bargaining agreements with Western which the unions contended required Western to bind Delta to those labor agreements.

In most of the recognized crafts or classes represented by the unions, Delta had approximately three times as many employees as Western. Those Delta employees have opted to have no collective bargaining representative. Thus, after the merger, a large majority (approximately 75%) of most crafts or classes would be (and ultimately was) made up of original

Delta employees who have never chosen to be represented by a labor union.

On September 9, 1986, Western and Delta entered into an Agreement and Plan of Merger ("Merger Agreement") providing for the acquisition of Western by Delta. The transaction was approved by the Department of Transportation ("DOT") on December 11, 1986 and by the shareholders of the two companies on December 16, 1986. The first step toward the merger, the transfer of the Western stock to Delta, occurred on December 18, 1986. After that initial step, Western was a wholly-owned subsidiary of Delta which existed as a separate corporation and was operated as a separate carrier. The second and final step was the legal merger of Western into Delta on April 1, 1987, at which time operations were combined, and Western ceased to exist.

In the Merger Agreement, the parties agreed that Western would honor its collective bargaining agreements as long as it continued operating as a separate carrier. Delta assured all Western employees that they would be employed by Western after the acquisition and that they were likely to be offered positions by Delta after the April 1 merger. Later, Delta did offer post-merger jobs to all Western permanent non-officer employees. Since the wages paid by Delta were significantly higher than those earned by Western employees in each of the affected crafts or classes, Delta gave substantial pay increases to most Western employees after the merger.

In the Merger Agreement, Delta also agreed to provide Western employees with labor protective provisions ("LPP's") at least as favorable as the standard LPP's imposed by the Civil Aeronautics Board

("CAB") in the *Allegheny-Mohawk Merger Case*, 59 C.A.B. 22 (1971). The LPP's require continuation of certain fringe benefits, displacement and dismissal allowances for employees losing their jobs or taking lesser-paying jobs, payment of moving and related costs for employees required to move, integration of seniority lists in a fair and equitable manner and establishment of a binding arbitration procedure for any dispute pertaining to the LPP's. Delta was the first carrier voluntarily to agree to be bound by those provisions in a merger since the DOT (which succeeded to the CAB's jurisdiction over airline mergers under the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978) (amending Federal Aviation Act of 1958, 49 U.S.C. §§ 1301-1542 (1982)), ceased imposing LPP's following deregulation of the airline industry.

II. The Proceedings Below

In separate actions commenced in the United States District Court for the Central District of California, the unions sought orders compelling Western to arbitrate their claims that Western was required to bind Delta to the unions' collective bargaining agreements. The district court found that the issues raised by these arbitration claims involved representation and were exclusively committed, under the Railway Labor Act, to the jurisdiction of the NMB. Accordingly, the district court held that it lacked subject matter jurisdiction over the unions' actions and dismissed them. (App. E-1, F-1) Subsequently, the unions appealed and the ATE filed a motion for an order compelling arbitration pending appeal. The IBT moved for an expedited appeal but did not seek a similar arbitration order.

On March 17, 1987, the Court of Appeals for the Ninth Circuit granted the ATE's request for an injunction compelling arbitration pending appeal, construed the IBT motion for expedited appeal as a motion for an order compelling arbitration pending appeal and, as construed, granted the IBT motion. (App. C-1, D-1) Delta and Western sought reconsideration and moved the circuit court to expedite and decide the cases before the long-planned merger was to be consummated on April 1. The circuit court granted the motion for expedited appeal and set oral argument for March 30. The unions then moved the circuit court to enjoin the merger. In papers filed with the circuit court and at the oral argument Delta and Western pointed out the staggering hardships to the two companies, their employees and the public that would result from any such last-minute injunction which might delay the merger, including the fact that the Federal Aviation Administration had indicated that it might find it necessary to close down the Western operation because of its concern that Western could not continue to operate independently after April 1.

On March 31, 1987, at approximately 8:00 P.M., Eastern Standard Time, the Ninth Circuit issued an order which, among other things, reversed the district court, ordered arbitration of the grievances, and enjoined the Delta-Western merger, which was to be completed the following morning. (App. B-1) On April 1, 1987, the Ninth Circuit issued its opinion setting forth the reasons for its order. (App. A-1) Despite the unions' claims that Western was required to bind Delta to the unions' collective bargaining agreements, the circuit court did not view the unions'

claims as raising representation issues involving Delta. 813 F.2d at 1362. Rather, relying on authority under the National Labor Relations Act, which does not apply to the airline industry, the circuit court held that the unions' claims were matters for arbitration and not within the exclusive jurisdiction of the NMB. *Id.* at 1363. The circuit court did so while expressly declining to decide whether an arbitrator could validly order representation by a union. *Id.*

III. The Proceedings Before This Court

In view of the irreparable harm faced by Delta and Western, their employees and the traveling public as a result of the eleventh-hour injunction granted by the Ninth Circuit, an emergency application for stay of the Ninth Circuit's order and for vacation of its injunction was filed with the Honorable Sandra Day O'Connor, the Circuit Justice for the Ninth Circuit. On April 1, 1987, at approximately 2:15 A.M., Justice O'Connor granted the stay, which will terminate automatically if certiorari is denied. (App. G-1)

On April 2, 1987, Justice O'Connor issued a written opinion (App. I-1), noting that the reasoning of every other court of appeals that had ruled on the issues presented in this case created grave doubt concerning the validity of the Ninth Circuit's decision. As the great weight of the caselaw favored the position of Delta and Western, Justice O'Connor found that:

> The Ninth Circuit's divergence from this line of Court of Appeals decisions leads me to find it very likely that at least four Justices would vote to grant certiorari, and that the applicant is likely to prevail on the merits.

Slip. op. at 6 (App. I-6).

The unions thereafter each filed motions to vacate the stay issued by Justice O'Connor. The full Court, with Justice Stevens not participating, denied the unions' motions on April 6, 1987.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CREATES A CONFLICT AMONG THE COURTS OF APPEALS REGARDING THE PROPER SCOPE OF JURISDICTION OF THE FEDERAL COURTS IN REPRESENTATION DISPUTES UNDER THE RAILWAY LABOR ACT

A. The NMB Has Exclusive Jurisdiction Of All Employee Representation Issues Under The Railway Labor Act And Every Other Court Of Appeals That Has Ruled On The Issue Has Concluded That The Courts Do Not Have Jurisdiction In Cases That Raise Questions Of Representation, Regardless Of The Context In Which They Arise

The Railway Labor Act ("RLA"), 45 U.S.C. §§ 151-163, regulates labor relations of the nation's railroads and, through Title II, 45 U.S.C. §§ 181-188, air carriers. The RLA defines three classes of labor disputes and establishes a different dispute resolution mechanism for each. "Minor" disputes are those which arise in connection with the application or interpretation of collective bargaining agreements. Minor disputes are subject to arbitration by a System Board of Adjustment. 45 U.S.C. § 184. "Major" disputes involve the formation of collective bargaining agreements. 45 U.S.C. §§ 156, 181. "Representation" disputes involve the determination of appropriate "crafts or classes" of employees for collective bargaining purposes and the selection of collective bargaining rep-

resentatives. 45 U.S.C. §§ 152, Fourth and Ninth, 181.

Employee representatives under the RLA are chosen by the majority of any craft or class, 45 U.S.C. § 152, Fourth. The NMB has exclusive jurisdiction of all disputes regarding employee representation, 45 U.S.C. § 152, Ninth. *See General Committee of Adjustment v. Southern Pacific Co.*, 320 U.S. 338 (1943); *General Committee of Adjustment v. Missouri-Kansas-Texas Railroad Co.*, 320 U.S. 323 (1943); *Switchmen's Union of North America v. National Mediation Board*, 320 U.S. 297 (1943).

The RLA contemplates that employees will be represented through systemwide crafts or classes of employees and that the majority of the employees in each craft or class may select a bargaining representative. The NMB has held on numerous occasions that it has no authority to split a craft or class or fragment a carrier's labor force:

> The Railway Labor Act does not authorize the National Mediation Board to certify representatives for small groups of employees arbitrarily selected. Representatives may be designated and authorized only for the *whole* of a craft or class employed by a carrier.

Pennsylvania Railroad Co., 1 N.M.B. 23, 24 (1937) (emphasis in original).

Applying this principle, the NMB has specifically held that upon the merger of two airlines, the representation certifications of unions of the acquired airline, whose employees will represent only a minority of the combined employee groups after the merger, are extinguished by operation of law at the

time of the merger. *See Northwest Airlines Inc.*, 13 N.M.B. 399 (1986); *Republic Airlines, Inc.*, 8 N.M.B. 49 (1980). More recently, in *Trans World Airlines/ Ozark Airlines*, 14 N.M.B. 218 (April 10, 1987), the NMB reaffirmed these principles, but indicated that representation certifications are not formally extinguished as a result of a merger until the NMB so rules.

The unions have attempted to evade the NMB's jurisdiction to address these representation questions in the instant merger by contending that they are merely seeking to arbitrate contractual grievances which do not affect representation. They claim that the successor provisions contained in their collective bargaining agreements required Western to extract promises from Delta to recognize the unions as the bargaining representatives and to honor their contracts after the completion of the merger. Any arbitration proceeding concerning such issues would by its very nature require resolution of the unions' post-merger representation rights, thereby usurping the NMB's exclusive authority over such matters. Regardless of the context in which such issues arise, or the relief sought, neither the courts nor labor arbitrators have jurisdiction over these issues. For the unions to be entitled to any relief, an arbitrator would have to determine that Western should have required Delta to assume the unions' contracts. The arbitrator thereby would step into the representational area exclusively reserved to the NMB.

Prior to this case, an unbroken line of appellate decisions established that the courts must look beyond the superficial form of a complaint to determine whether, as here, it masks an underlying represen-

tation dispute. Regardless of the context, if representation issues are involved, the courts are required to dismiss the complaint for lack of jurisdiction. *See, e.g., Air Line Employees Association v. Republic Airlines Inc.*, 798 F.2d 967, 968 (7th Cir.) (per curiam), *cert. denied*, ___ U.S. ___, 107 S. Ct. 458 (1986) (pre-merger action for expedited arbitration of grievance); *International Brotherhood of Teamsters v. Texas International Airlines Inc.*, 717 F.2d 157, 158 (5th Cir. 1983) (seeking declaration that union's contract survived a merger); *Air Line Pilots Association v. Texas International Airlines Inc.*, 656 F.2d 16, 19 (2d Cir. 1981) (action to enforce contract on carrier's subsidiary); *International Association of Machinists v. Northeast Airlines Inc.*, 536 F.2d 975, 977 (1st Cir.), *cert. denied*, 429 U.S. 961 (1976) (seeking negotiation of employees' post-merger rights); *Flight Engineers International Association v. Eastern Air Lines Inc.*, 359 F.2d 303, 307 (2d Cir. 1966) (seeking reinstatement of replaced striking employees); *Brotherhood of Railway and Steamship Clerks v. United Air Lines Inc.*, 325 F.2d 576, 579 (6th Cir. 1963), *cert. dismissed*, 379 U.S. 26 (1964) (seeking declaration that union's contract survived a merger); *Flight Engineers International Association v. Eastern Air Lines Inc.*, 311 F.2d 745, 746 (2d Cir.), *cert. denied*, 373 U.S. 924 (1963) (seeking injunction requiring airline to bargain); *Division No. 14, Order of Railroad Telegraphers v. Leighty*, 298 F.2d 17 (4th Cir.), *cert. denied*, 369 U.S. 885 (1962) (seeking to enjoin agreement between railroad and parent union).

B. The Ninth Circuit's Decision In The Instant Case Conflicts With Every Other Appellate Decision Regarding The Effect Of Collective Bargaining Agreements On Employee Representation Issues In Airline Mergers

As Justice O'Connor stated in her April 2, 1987 written opinion:

> The reasoning of every other Court of Appeals that has ruled on the issue raised before the Ninth Circuit casts grave doubt on the validity of the Ninth Circuit's action in this case. The great weight of the caselaw supports the proposition that disputes as to the effect of collective-bargaining agreements on representation in an airline merger situation are representation disputes within the exclusive jurisdiction of the National Mediation Board.

Slip op. at 4 (App. I-4, 5). The Courts of Appeals of four circuits, the First, Fifth, Sixth and Seventh, have specifically ruled that the courts have no jurisdiction in actions to enforce union contracts in connection with airline mergers because such actions inevitably raise representation questions.

The Seventh Circuit's recent decision in *Air Line Employees Association v. Republic Airlines Inc.*, 798 F.2d 967 (7th Cir.) (per curiam), *cert. denied*, ___ U.S. ___, 107 S. Ct. 458 (1986) ("*ALEA v. Republic*"), is especially instructive as its facts are indistinguishable from those here. In anticipation of a merger with Republic Airlines, Northwest Airlines agreed in advance to recognize two of its own unions as representatives of the combined workforce after the merger was to take place. Before this "transition agreement" became effective, one of Republic's unions, the Air

Line Employees Association ("ALEA"), brought an action against Republic and Northwest challenging the transition agreement as a breach of ALEA's labor contract with Republic. Like the unions' suits here, ALEA's suit reached the Seventh Circuit *prior* to the merger. 798 F.2d at 967. Further, Count 3 of ALEA's complaint sought the same relief the unions seek here, "an order compelling expedited arbitration of its grievance challenging defendants' contract violations and preserving the *status quo* pending issuance of the arbitrator's decision." *Id.* at 968.

Thus, the Seventh Circuit had before it all of the elements of the case here at the time of the Ninth Circuit's decision, *i.e.*, a *premerger* contract action against the *premerger* carrier while the labor agreement was still in effect. Nevertheless, unlike the Ninth Circuit, the Seventh Circuit affirmed the dismissal of ALEA's complaint for lack of jurisdiction:

> [T]he district judge's decision was in conformity with—as he put it—'*the overwhelming and well-developed case law* addressing issues similar to those presented in the instant complaint.' . . . [W]e find no reason to depart from the consistent and well-considered analysis of our colleagues in other circuits. . . . *[E]ven though the complaint was couched in terms of enforcing the collective bargaining agreement, the dispute was basically a representational dispute and therefore committed to the sole jurisdiction of the NMB* . . . .

Id. (footnote and citation omitted, emphasis added).[1]

---

[1] The Ninth Circuit incorrectly attempted to distinguish *ALEA v. Republic* as "a dispute between two unions concerning post-

To the same effect is the Fifth Circuit's decision in *International Brotherhood of Teamsters v. Texas International Airlines Inc.*, 717 F.2d 157 (5th Cir. 1983). After Texas International merged with the larger Continental Air Lines, Texas International's 1,800 Teamsters found themselves subsumed in an unorganized unit of 4,000 Continental employees, and Continental refused to recognize the Teamsters or their premerger agreement. Although the Teamsters' declaratory action, like the unions' suits here, purported only to seek enforcement of the union's contract, the Fifth Circuit nevertheless held that the action for contract enforcement hinged on the underlying representation dispute. *Id.* at 161. The court found as a consequence that it had no jurisdiction to intervene:

---

merger representation" and "essentially . . . an attempt to secure a court order deciding which union should represent employees after the merger." 813 F.2d at 1363 (App. A-8). The Seventh Circuit dismissed ALEA's claim seeking premerger arbitration of its grievance, as well as its other claims for court relief. 798 F.2d at 968. The representational nature of the dispute was not affected by the form of relief sought. Moreover, it does not matter whether a representation dispute is between two unions, as in *ALEA v. Republic*, or between minority unions and an unrepresented majority of employees, as here. A representation dispute is triggered by the claim of even a single union to representative status. *International Brotherhood of Teamsters v. Texas International Airlines Inc.*, 717 F.2d 157, 163 (5th Cir. 1983); *Air Line Pilots Association v. Texas International Airlines Inc.*, 656 F.2d 16, 24 (2d Cir. 1981) ("[E]ven in the absence of a challenge by a competing union or an application to the NMB, the court is bound to dismiss the action"). *Summit Airlines v. Teamsters*, 628 F.2d 787, 793 n.3 (2d Cir. 1980) (Representation dispute exists "even though only one union seeks representation if some employees are indifferent or hostile to being represented").

> Enforcement of the contract, therefore, inescapably entailed the continuance of the Union's role as employee representative for the minority group, in accordance with its 1980 certification. Continuation of the contract in force unavoidably constitutes a determination of employee representation, and the conjunction of the two issues creates a conflict in principles, one dictated by the express statutory provision giving the Board sole jurisdiction over representation matters and the other implicit from the limited scope of the statute, that other disputes are reserved for judicial resolution.

Id. The court continued:

> Given the Mediation Board's undeniable sole jurisdiction over representation matters, we infer from the practical problems of divided jurisdiction a congressional intention to allow that agency alone to consider the post-merger problems that arise from existing collective bargaining agreements.

Id. at 164.

The same principles apply here. The Ninth Circuit's order compelling arbitration and staying the merger assumes jurisdiction over a representation dispute involving recognition of the unions and their labor agreements after the merger of Delta and Western. The Ninth Circuit decision also erroneously would allow an arbitrator to decide questions of representation within the NMB's exclusive jurisdiction. These actions simply cannot be reconciled with the Fifth and Seventh Circuit decisions or with the RLA.

Indeed, since *Brotherhood of Railway and Steamship Clerks v. United Air Lines Inc.*, 325 F.2d 576 (6th Cir. 1963), *cert. dismissed*, 379 U.S. 26 (1964), was decided, the courts have recognized that placing a representation issue in the form of a contract dispute cannot oust the NMB of its exclusive jurisdiction. In that case the premerger contract of United's merger partner (Capital Airlines) with the Railway Clerks contained an express successor clause which the union sought to enforce. The Sixth Circuit affirmed dismissal for lack of jurisdiction saying:

> [A]lthough the suit is cast in the form of an action under the law of contracts, it in fact involves a representation dispute. Even though an action is brought as one sounding in contract the courts have no jurisdiction 'where "validity" of the contract depends upon the merits of a representation dispute.'

325 F.2d at 579 (citation omitted).

The First Circuit reached a similar conclusion, citing the *United* case. In *International Association of Machinists v. Northeast Airlines Inc.*, 536 F.2d 975, 977 (1st Cir.), *cert. denied*, 429 U.S. 961 (1976), the court found no jurisdiction to order the post-merger employer to bargain with the pre-merger union, saying:

> At the very least, the merger created real doubts about whether plaintiffs represent the majority of any Delta craft or class of employees, and where there is such doubt, federal courts leave resolution of the dispute to the National Mediation Board.

536 F.2d at 977.

In addition, a number of district courts have reached the same conclusion in recent cases. Apart from the two cases decided below, two other district courts recently have decided this same issue in accord with the appellate cases cited above and have dismissed the union actions on jurisdictional grounds. In both cases, as here, the union's action to compel arbitration of a grievance was brought *prior* to the merger against the *premerger* carrier while the union's labor agreement was still in effect. In *Association of Flight Attendants v. Western Air Lines, Inc.*, No. 87-0040 (D.D.C. Feb. 20, 1987) (App. K-1), which also arises out of the Delta-Western merger and raises the same issues raised here, Judge Gesell said:

> Where both representational issues and 'minor' disputes which arguably may not involve representational issues are involved in a single dispute, it is not the role of a court to attempt to define such minor issues and require they be segregated for evaluation by the System Board. As a practical matter the issues inevitably overlap, and any attempt to divide jurisdiction between the System Board and the National Mediation Board would defeat the purposes of the RLA. This is particularly true in merger situations where representational issues inevitably arise and it is 'impossible to look only to the existence of a collective bargaining agreement and to isolate it from the other operational and representational matters.'

Slip. op. at 5-6 (footnote and citation omitted) (App. K-5).

In *International Brotherhood of Teamsters, Airline Division v. Pacific Southwest Airlines, et al.*, No. C-87-0402 MHP (N.D. Cal. Mar. 20, 1987) (App. L-1), Judge Patel said:

> Since the disputed terms arise in the context of contractual language prospectively obliging PSA to assure the inclusion of certain terms in any subsequent merger agreement, the provisions do not purport to directly govern the post-merger employment and representation of any employee. Nonetheless, courts have consistently held that such terms effectively deny the National Mediation Board's sole jurisdiction over representation matters.

Slip op. at 9 (footnote omitted) (App. L-8).

C. The Ninth Circuit Relied Upon Inapposite Authority To Reach Its Erroneous Decision

The Ninth Circuit relied primarily on *Local Lodge No. 1266 v. Panoramic Corp.*, 668 F.2d 276 (7th Cir. 1981), a decision not under the RLA, but under the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151-169. 813 F.2d at 1363 (App. A-8). The Ninth Circuit erroneously assumed that the two Acts impose the same requirements in representation matters. The law, however, is to the contrary.

Judge Friendly in *Ruby v. American Airlines, Inc.*, 323 F.2d 248 (2d Cir. 1963), *cert. denied*, 376 U.S. 913 (1964), highlighted the differences between the two statutes in representation disputes. The Second Circuit held it had no jurisdiction under the RLA to intervene in a representation dispute between two unions and expressly rejected one union's argument

that it should apply the allegedly contrary principles of the NLRA:

> [T]he claim that the courts should do under the Railway Labor Act what Congress directed the NLRB to do under the National Labor Relations Act not only flies in the face of the difference in the language and scheme of the two statutes but ignores the diverse problems to which they were addressed. . . . For the courts to require the Mediation Board to transform itself into an adjudicative and prosecutorial agency like the N.L.R.B. or to impose themselves upon it would distort the entire Congressional scheme.

323 F.2d at 256 (footnote and citations omitted). *Accord International Association of Machinists v. Northeast Airlines Inc.*, 536 F.2d 975, 977 (1st Cir.), *cert. denied*, 429 U.S. 961 (1976) (RLA obligations are *not* the same as NLRA obligations where a merger raises doubts about union's majority status in the post-merger class or craft). *See also General Committee of Adjustment v. Southern Pacific Co.*, 320 U.S. 338, 342-43 (1943) (Court could not, by analogy to the NLRA, determine which union should represent employees in certain types of grievances); *Aircraft Mechanics Fraternal Association v. United Airlines*, 406 F. Supp. 492, 508 (N.D. Cal. 1976) ("We do not feel compelled to expand, indeed we feel prohibited from expanding, the limited scope of [judicial] jurisdiction existing under the Railway Labor Act by analogy to the National Labor Relations Act under which the scope of [judicial] jurisdiction is much greater").

As all these courts have recognized, the RLA and NLRA impose very different obligations upon the par-

ties. The NMB's sweeping exclusive jurisdiction over representation disputes under the RLA and the RLA's requirement of a single carrier-wide representative for each craft or class have no counterparts under the NLRA. By contrast under the NLRA, the National Labor Relations Board ("NLRB") has primary, but not exclusive, jurisdiction over representation issues, *Carpenters' Local Union No. 1478 v. Stevens*, 743 F.2d 1271, 1278-79 (9th Cir. 1984), *cert. denied*, 471 U.S. 1015 (1985), and the NLRB may certify an "employer unit, craft unit, plant unit or subdivision thereof." 29 U.S.C. § 159(b).

These differences are critical. In the NLRA context it is possible for a court to order arbitration of a successor grievance because (1) the NLRB's exclusive jurisdiction would not be usurped, and (2) there are no systemwide crafts or classes that might be fragmented by an arbitrator's decision. The Ninth Circuit's failure to recognize these differences led to its anomalous decision which is at odds with the decisions of the other circuits discussed above.

By ignoring the previously uniform decisions of the other circuits, the Ninth Circuit not only asserted jurisdiction over a matter within the exclusive domain of the NMB, but it also improperly would allow an arbitrator to decide representation issues. Its decision creates a direct, irreconcilable conflict among the circuits regarding the jurisdiction of the courts, of the NMB and of arbitrators in connection with representation disputes arising under the RLA, and this Court must resolve that conflict.

II. THE DECISION BELOW DIRECTLY CONFLICTS WITH THE RAILWAY LABOR ACT AND THE STATUTORY AUTHORITY OF THE NATIONAL MEDIATION BOARD

The RLA provides: "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter." 45 U.S.C. § 152, Fourth. In exercising its statutory authority to resolve representation disputes under the RLA, the NMB has determined that it cannot designate less than a carrier-wide craft or class of employees for purposes of collective bargaining representation. As the NMB explained in *New York Central Railroad Co.*, 1 N.M.B. 197, 209-10 (1941), single representation for a craft or class on a carrier-wide basis was mandated by Congress, and splitting a craft or class contravenes the legislative directive. *See also Seaboard Coast Line Railroad Co.*, 6 N.M.B. 63, 64-65 (1976); *Railway Express Agency,* 4 N.M.B. 227, 231 (1964). Yet the fragmenting of the post-merger crafts or classes is precisely what the Ninth Circuit's decision would allow by compelling arbitration of the unions' claims that Western must bind Delta to recognize the unions and their contracts for the minority groups of former Western employees after the merger.

The NMB has consistently refused to fragment crafts or classes in exercising its jurisdiction in airline merger cases because of its RLA mandate to preserve employee relations stability in the vital transportation industries. *Railway Express Agency*, 4 N.M.B. 227, 231 (1964). It has also recognized that such fragmentation would preclude effective integration of a combined carrier's post-merger operations into a sin-

gle transportation system. *Republic Airlines Inc.*, 8 N.M.B. 49, 54-55 (1980). Effective integration of a post-merger labor force is impossible where some employees are represented by a union, while others, performing the same job alongside union members, are not. Different work rules and terms and conditions of employment would apply to employees doing the same jobs at the same locations, and the inefficiencies of such an operation would be totally inconsistent with the original purpose of the merger. *See International Brotherhood of Teamsters v. Texas International Airlines, Inc.*, 717 F.2d 157, 163 (5th Cir. 1983).

Where a smaller airline is merged into a larger one, the NMB determines whether the two carriers become one carrier and, therefore, whether the certifications of the smaller carrier's collective bargaining representatives survive the merger. *Republic Airlines, Inc.*, 8 N.M.B. 49, 56 (1980). Under the NMB's procedures, each craft or class can be represented, if at all, on a systemwide basis only, and a merger of air carriers resulting in a single transportation system has the effect of terminating any certification of a representative of less than a majority of the employees in a combined craft or class. *Northwest Airlines, Inc.*, 13 N.M.B. 399 (1986). *See also International Brotherhood of Teamsters v. Texas International, Inc.*, 717 F.2d 157, 163 (5th Cir. 1983) (recognizing NMB rules regarding extinguishing of certification of bargaining representative upon merger of air carriers).

In its recent decision in *Trans World Airlines/Ozark Airlines*, 14 N.M.B. 218 (April 10, 1987), the NMB ruled that the degree of integration of the operations of two carriers into a single transportation system determines whether the certifications of minority rep-

resentatives are terminated. *Id.* at 236. The NMB also said that in view of the increasing number of mergers under deregulation it intends to develop and implement more definitive guidelines in the near future. *Id.* at 241. Thus, the NMB has demonstrated its intent, ability, and flexibility to address and resolve any and all representation disputes arising from airline mergers.

Furthermore, prior to the April 10, 1987 NMB decision in *TWA*, *supra*, a union could invoke the § 152, Ninth services of the NMB, which includes procedures for employee voting with respect to a representation dispute, but a carrier could not. *Brotherhood of Railway and Steamship Clerks v. Non-Contract Employees*, 380 U.S. 650 (1965). Neither the ATE nor the IBT chose to do so in the instant case, and Western and Delta could not. However, in *TWA*, *supra* at 241-42, the NMB stated, for the first time, that "carriers involved in a merger, acquisition or consolidation will be permitted to invoke the Board's services for determination of whether any NMB certifications have terminated." Subsequently, on April 20, 1987, Delta invoked the NMB's services in this case. The NMB has accepted Delta's invocation of its services and has asked Delta and the unions for certain information to make its determination. Thus, the NMB has asserted and is exercising its exclusive jurisdiction over these representation matters.

Instead of invoking the mandatory NMB processes, the unions sought judicial and arbitral relief. By permitting such forum shopping and endorsing the intervention of the federal courts and labor arbitrators in representation disputes, the decision of the Ninth Circuit directly conflicts with the purposes of the RLA

and usurps the exclusive statutory authority of the NMB to investigate and resolve such representational disputes. The Ninth Circuit decision permitting arbitration where representation issues are involved would also lead to fragmentation of the carrier-wide craft or class bargaining units provided for by the RLA. The exclusivity of the NMB's jurisdiction over representation issues was established to assure, through a single agency's determinations, national uniformity and adherence to the RLA representation principles. In order to preserve these principles, the Ninth Circuit's decision must be reviewed and reversed.

III. THIS CASE PRESENTS ISSUES OF NATIONAL POLICY CRITICAL TO THE VITAL AIR AND RAIL TRANSPORTATION INDUSTRIES

Airline mergers have become an increasingly frequent event in the transportation industry, impelled in large part by heightened competition resulting from airline deregulation. These mergers involve thousands of employees and hundreds of millions of dollars in assets. They affect transportation systems used by many millions of persons annually. Any disruption of this vital industry, such as that threatened by the Ninth Circuit's decision, is of national concern. Moreover, because the decision is under the RLA, it could lead to further incorrect decisions affecting the railroad industry.

The Ninth Circuit's decision cannot be viewed as merely an isolated, localized or technical construction of the law. Many airlines, such as Delta and Western, are vulnerable to suit in several circuits, including the Ninth Circuit, because of their extensive operations. Further, most union contracts in the airline industry

contain successor provisions, or other provisions that might be construed to empower arbitrators to decide representation issues, as the unions have construed their contracts here. The combination of these factors not only subjects merging airlines to the disruptions caused by the Ninth Circuit's invasion of the NMB's jurisdiction, but also potentially subjects them to conflicting requirements in different circuits with regard to the *same* merger.

The instant merger illustrates how those inconsistencies can arise. On the same day that the Ninth Circuit issued its decision compelling arbitration of the unions' grievances and enjoining the Delta-Western merger, the Court of Appeals for the District of Columbia Circuit *denied* a third union's motion to compel arbitration pending appeal, which was brought on a legal theory identical to those used by the ATE and IBT below. *Association of Flight Attendants v. Western Air Lines, Inc.*, No. 87-7040 (D.C. Cir. Mar. 31, 1987). (App. J-1)

That ruling indicates that the District of Columbia Circuit is likely to follow the other circuits which have concluded that the NMB has exclusive jurisdiction. Thus, unless the Ninth Circuit is reversed, Delta is presented with the real possibility that different results will be reached by the two courts of appeals in the same merger.

It was precisely to avoid such conflicts, and the resulting fragmentation of the carrier's labor force, that Congress vested exclusive jurisdiction over representation disputes in the NMB. Obviously, it is intolerable for the NMB's exclusive jurisdiction over representation disputes arising in airline and railroad mergers to be recognized in the District of Columbia,

First, Fifth, Sixth and Seventh Circuits, but not in the Ninth Circuit.

With so much at stake in the merger of air and rail carriers, the interests of the parties involved and those of the general public require that the issues raised here be definitely resolved, and that this previously settled area of labor law be put right again. The disruption caused by the Ninth Circuit's ruling in the instant merger alone is of national concern, but, even more broadly, the questions raised here are certain to arise again as pending and future mergers are consummated in the airline and railroad industries. It is therefore most important that the Court finally resolve these questions.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that a Writ of Certiorari be granted to review the decision of the Ninth Circuit Court of Appeals. Indeed, in view of the clear error of the Ninth Circuit, Petitioner suggests that summary reversal of this case may be appropriate.

Respectfully submitted,

WILLIAM J. KILBERG
Counsel of Record
SCOTT A. KRUSE
H. JOSEPH GORE
GIBSON, DUNN & CRUTCHER
Suite 900
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

JEFFERSON D. KIRBY, III
MICHAEL H. CAMPBELL
PAUL D. JONES
FORD & HARRISON
600 Peachtree at the Circle Building
1275 Peachtree Street, N. E.
Atlanta, Georgia 30309
(404) 888-3800

JAMES W. CALLISON
ROBERT S. HARKEY
WALTER A. BRILL
Law Department
Delta Air Lines, Inc.
Hartsfield Atlanta Int'l Airport
Atlanta, Georgia 30320
(404) 765-2387

Counsel for Petitioners

APPENDIX

APPENDIX A

FOR PUBLICATION
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 87-5657/5667

D.C. Nos.
CV-867-7921-JMI
CV-86-8032

FILED
APR 1 1987

IBTCWHA, LOCAL UNION NO. 2702,
Plaintiff-Appellant,

v.

WESTERN AIR LINES, INC., *et al.*,
Defendants-Appellees

AIR TRANSPORT EMPLOYEES,
Plaintiff-Appellant,

v.

Western Air Lines, Inc.,
Defendant-Appellee.

OPINION

Appeal from the United States District Court
For the Central District of California
James M. Ideman, District Judge, Presiding
Argued and submitted March 30, 1987
San Francisco, California
Decided March 31, 1987
Opinion Filed: April 1, 1987

Before: GOODWIN, SCHROEDER, and POOLE, Circuit Judges.

PER CURIAM:

Plaintiffs-Appellants are the International Brotherhood of Teamsters (IBT) and Air Transport Employees (ATE), two unions which represent employees of Western Air Lines. They filed these actions, which we have consolidated on appeal, to require Western to arbitrate the unions' claims that Western's agreement to merge with Delta Air Lines violates collective bargaining agreements between Western and the unions.

The district court dismissed the actions because it viewed the disputes as representational disputes within the exclusive jurisdiction of the National Mediation Board (NMB or Board). *See* 45 U.S.C. § 152. The unions, on the other hand, characterize the disputes as concerning the proper interpretation of terms of collective bargaining agreements, including specifically bargained for provisions on mergers, and thus arbitrable as minor disputes under the Railway Labor Act (RLA). *See* 45 U.S.C. § 184. The unions point out that the Board lacks authority to enforce contracts, *see Chicago & N.W. Ry. v. United Transportation Union*, 402 U.S. 570 (1971).

We granted both unions' requests for injunctive relief pending appeal and ordered arbitration to proceed on an expedited basis. All parties have requested an expedited hearing of the merits of the appeal, and we have granted such expedited treatment so that the issue of the arbitrability of the dispute can be resolved before the scheduled merger of the two airlines on April 1, 1987. We hold that the disputes are arbitrable (minor) disputes under the RLA because they center on the applicability and interpretation of collective bargaining agreements. The arbitrations cannot be completed prior to the date of the scheduled merger of the two airlines, however, and if the merger is consummated as planned there will be no entity with whom

the unions may arbitrate. In order to preserve the status quo, *see Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas R.R.*, 363 U.S. 528, 531 (1960), we order Western Air Lines to take appropriate steps to see that a valid award of the arbitrator may be enforced.

BACKGROUND

ATE is the certified representative of Western's clerical, office, fleet, and passenger service employees. IBT represents Western's mechanics, stock clerks, and flight instructors.

Western's collective bargaining agreement with ATE states that the agreement shall be binding on any successor of Western and that the successor shall continue to apply the terms of the agreement until the agreement is changed in accordance with the RLA. Western's agreement with IBT similarly provides that the collective bargaining agreements are binding on Western's successors and that, in case of consolidation or merger, Western and IBT shall meet to negotiate provisions for protection of Western employees.

On September 1, 1984, IBT and Western signed a letter of agreement stating that if Western were the object of an unfriendly takeover, it would require the acquiring airline to assume its collective bargaining agreement obligations to IBT. The letter further states that Western will be liable to IBT and Western's employees for damages if Western fails to obtain such agreement from the acquiring airline.

A second letter of agreement between IBT and Western, dated September 14, 1984, states that Western will not agree to a merger unless the acquiring airline agrees that Western's maintenance facilities will be operated separately from those of the acquiring airline, unless IBT agrees to integration of Western's mechanics with those of the purchasing company. The letter further stipulates that after

a merger all work performed by Western employees represented by IBT would continue to be assigned to those employees, and that work would continue to be recognized as within IBT's jurisdiction and covered by the IBT-Western collective bargaining agreements. Similar understandings with respect to merger were negotiated with ATE.

These merger provisions between IBT and ATE and Western were agreed to as part of extensive negotiations which included wage concessions of ten percent for IBT-represented employees and ten to twenty percent by ATE-represented employees.

On September 9, 1986, Delta, its subsidiary DL Acquisition Corp., and Western entered into an agreement to merge Western into Delta. The United States Department of Transportation approved the merger and Delta acquired Western's shares on December 16, 1986. Delta's acquisition of Western stock constituted the first phase of the merger. The second phase is scheduled to occur on April 1, 1987, when Delta will combine operations of the two airlines. Western will cease to exist as a separate corporate entity on that date. The merger agreement between Western and Delta does not provide that Delta will recognize the unions or be bound by the Western-ATE/IBT collective bargaining agreements after April 1. It apparently makes no mention of Western's agreements with the unions regarding merger. Delta employees within the crafts covered by these collective bargaining agreements are not represented by any union.

Both unions filed grievances regarding Western's alleged failure to comply with the collective bargaining agreements. Both unions alleged that the collective bargaining agreements were breached by Western's agreement to merge. Western responded that the clauses and letters of agreement were inapplicable to the merger. Both unions then requested arbitration of whether there had been a breach by the merger agreement. Western refused

to submit to arbitration of these issues on the ground that they might result in the arbitration deciding who would properly represent Delta employees after the merger. Western argued that because these issues involve the unions' representation status, they are not arbitrable, but instead are subject to the exclusive jurisdiction of the NMB.

Both unions then filed actions in the district court for injunctions to compel arbitration. On February 17, 1987, the district court considered both cases simultaneously and dismissed both actions for lack of jurisdiction. In both cases, the court in two-page orders agreed with Western that the disputes involved representation issues over which the NMB has exclusive jurisdiction. Both unions timely appealed.

THESE APPEALS

The merits of these appeals concern essentially jurisdictional questions. They are whether the provisions of the collective bargaining agreements or the letters of agreement, are enforceable through arbitration, or whether they raise questions of representation that can be decided only by the NMB.

The RLA, which governs labor relations in the railroad and airline industries, defines three classes of labor disputes. *International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America v. Texas International Airlines, Inc.*, 717 F.2d 157, 158 (5th Cir. 1983) (representation, minor, and major). None of the parties contend that this is a major dispute, so we are concerned only with the distinction between representation and minor disputes.

Representation disputes involve determining the collective bargaining representative of the employees and the proper bargaining unit, craft, or class of employees to be represented. *Id.* at 158-59. A dispute as to the proper representative of airline employees is committed to the

exclusive jurisdiction of the NMB. *Id;* 45 U.S.C. § 152 (Ninth). Thus, federal courts lack jurisdiction over actions raising such disputes.

A minor dispute involves a disagreement over the application or interpretation of an existing collective bargaining agreement. *International Association of Machinists and Aerospace Workers v. Aloha Airlines, Inc.*, 776 F.2d 812, 815 (9th Cir. 1985). Any controversy over the meaning of a collective bargaining agreement in the context of a particular fact situation is a minor dispute. *See International Association of Machinists and Aerospace Workers v. Republic Airlines*, 761 F.2d 1386, 1390 (9th Cir. 1984), *Kaschak v. Consolidated Rail Corp.*, 707 F.2d 902, 905 (6th Cir. 1983). We have said that where the position of one party is expressly and arguably predicated on the terms of the agreement, "the question of whether the position is well taken involves a minor dispute." *Switchmen's Union of North America v. Southern Pacific Co.*, 398 F.2d 443, 447 (9th Cir. 1968). *Aloha Airlines*, 776 F.2d at 816; *O'Donnell v. Wien Air Alaska, Inc.*, 551 F.2d 1141, 1146-47 (9th Cir. 1977). The exclusive means of resolving such disputes is through RLA grievance and arbitration procedures which can be compelled by court order. *See Republic Airlines*, 761 F.2d at 1389-90. The arbitrator, however, has primary and exclusive jurisdiction to interpret the provisions of a collective bargaining agreement and fashion the appropriate award in case of breach. *Id.* at 1390.

It is important here to view these cases in the context in which they now exist. The unions have been certified by NMB as the bargaining representatives of Western employees. At the time these cases were filed, Western existed as an independent operational entity. However, Western's separate corporate operations at the time of this writing are scheduled to cease momentarily.

The unions are not seeking either by this action or by arbitration to obtain recognition by Western of their status as the collective bargaining representatives of Western's employees; the unions already have such recognition. Similarly, the unions are not seeking a determination that they are the collective bargaining representative of Delta employees. This action seeks arbitration with Western, not Delta. The arbitration is not likely to make a determination that any union or unions will become the representative of Delta employees, given the scope of jurisdiction of the Systems Adjustment Board. *See* 45 U.S.C. § 184. Instead, the unions seek a determination that Western breached its agreement by agreeing to a merger with an airline that did not agree to voluntarily recognize the unions. Thus, strictly speaking, the actions by these unions are not for resolution of "representation" disputes, but are merely claims that Western has breached its contract.

Western contends, and the district court agreed, that other circuits have held that disputes similar to those raised by IBT and ATE involved representation and thus were not arbitrable. These cases, however, generally involve an attempt by a union after a merger has taken effect to force a successor employer to be bound by a collective bargaining agreement entered into by the union and the predecessor employer. *Texas International Airlines,* 717 F.2d at 158, *International Association of Machinists and Aerospace Workers v. Northeast Airlines, Inc.,* 536 F.2d 975, 976 (1st Cir.), *cert. denied,* 429 U.S. 961 (1976). *See also Air Line Pilots Association, International v. Texas International Airlines, Inc.,* 656 F.2d 16, 17-18 (2d Cir. 1981).

For this reason appellees place particular reliance upon *Air Line Employees Association, International v. Republic Airlines, Inc.,* 798 F.2d 967 (7th Cir.) (per curiam), *cert. denied,* 107 S. Ct. 458 (1986), a case filed before a merger. Although the multi-count complaint contained a count alleging breach of the collective bargaining agreement and

seeking arbitration, the case was clearly a dispute between two unions concerning post-merger representation. The relief sought included a court ordered election to determine majority status. The court properly treated the case essentially as an attempt to secure a court order deciding which union should represent employees after the merger, and dismissed for lack of jurisdiction over representation matters, relying upon the Fifth Circuit's decision in *Texas International Airlines.*

A more instructive decision from the Seventh Circuit is *Local Lodge No. 1266 v. Panoramic Corp.*, 668 F.2d 276 (7th Cir. 1981), in which arbitration of a successor-employer clause was sought. The court affirmed an order enjoining a sale of corporate assets pending arbitration, stating:

> We conclude that the Union's claim that the proposed sale of the [company] violates the "successors" clause of the collective bargaining agreement raises a sufficiently "genuine" dispute to support a status quo injunction. We decline Panoramic's invitation to parse the language of the "successors" clause, which Panoramic contends cannot support the Union's interpretation. Contract interpretation is the function of the arbitrator not the courts.

Id. at 285. Although *Panoramic* arose under the National Labor Relations Act rather than the RLA, the role of the arbitrator in interpreting the contract under the RLA is exclusive, and thus very broad. *Aloha Airlines,* 776 F.2d at 815. *See also International Association of Machinists and Aerospace Workers v. Northeast Airlines, Inc.*, 473 F.2d 549, 551 (1st Cir.), *cert. denied,* 409 U.S. 845 (1972). In *Northeast Airlines,* the collective bargaining agreement provided that it would be binding on successors of Northeast, and that if a merger were imminent, representatives of Northeast and the union would meet to negotiate pro-

tective provisions for Northeast employees. Although the court refused to enjoin the merger due to its finding under a balance of hardships analysis that Northeast would go out of business if the merger failed, *id.* at 553-59, it stated that whether Northeast was required by the successor-employer clause to negotiate with the union regarding post-merger employee rights was a minor dispute and thus arbitrable. *Id.* at 554-55.

We have recognized that injunctive relief is appropriate to compel parties to fulfill their obligations under the RLA. *Federal Express Corp. v. Teamster Union,* 617 F.2d 524, 526 (9th Cir. 1980). Arbitration is such an obligation and we therefore hold that the district court erred in deciding that it was without jurisdiction to enter an order to arbitrate.

We face, however, the practical problem that at this late stage, with the merger imminent and one party to the arbitration about to cease its independent existence, the district court will lose jurisdiction to enter an effective arbitration order if the merger takes place as presently planned. The unions have therefore asked that we enjoin the merger in its entirety pending arbitration, a step resisted by Western because of the disruption to its other contractual obligations. Such disruption may be avoided, however, if appropriate steps are taken to see that the successor corporation agrees to honor the contractual obligations, if any, of Western to the unions.

We express no opinion as to the proper interpretation of the contract or the appropriate remedies in the event the arbitrator determines that there has been a breach. We expressly decline to decide whether the arbitrator can validly order representation by any union. It is the function of the arbitrator, not the courts, to decide the meaning of the contract and to consider appropriate remedies in the first instance. The courts can and should preserve the status quo so that such arbitration may proceed under the

RLA. *See Brotherhood of Locomotive Engineers*, 363 U.S. at 531.

We have therefore directed the following:

1. The judgments of the district court dismissing the unions' actions are reversed and the causes are remanded with instructions to enter orders compelling arbitration.

2. Western's motion for reconsideration of our order compelling arbitration pending appeal is denied.

3. The contemplated merger of Western Air Lines and Delta Air Lines is enjoined pending completion of arbitration proceedings or until Western and Delta file with the clerk of this court a stipulation that the result of the arbitration, subject to appropriate judicial review and all valid defenses, will bind the successor corporation. Upon filing of such stipulation and approval by this court, the injunction of the merger shall terminate.

4. Subject to the provisions of the foregoing paragraph, the district court shall retain jurisdiction to ensure that the arbitration proceeds without undue delay.

5. Because the injunction is ordered to preserve the jurisdiction of the district court and the Systems Adjustment Board, under the Railway Labor Act, no bond will be required.

6. Each party is to bear its own costs.

It is so ordered.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 87-5657/5667

D.C. Nos.
CV-86-7921-JMI
CV-86-8032

FILED
MAR 31 1987

IBTCWHA, LOCAL UNION NO. 2702,
Plaintiff-Appellant,

v.

WESTERN AIR LINES, INC., *et al.*,
Defendants-Appellees

AIR TRANSPORT EMPLOYEES,
Plaintiff-Appellant,

v.

Western Air Lines, Inc.,
Defendant-Appellee.

ORDER

Before: GOODWIN, SCHROEDER, and POOLE, Circuit Judges

1. The judgments of the district court dismissing the unions' actions are reversed and the causes are remanded with instructions to enter orders compelling arbitration.

2. Western's motion for reconsideration of our order compelling arbitration pending appeal is denied.

3. The contemplated merger of Western Air Lines and Delta Air Lines is enjoined pending completion of arbitration proceedings or until Western and Delta file with the Clerk of this Court a stipulation that the result of the arbitration, subject to appropriate judicial review and all valid defenses, will bind the successor corporation. Upon filing of such stipulation and approval by this court, the injunction of the merger shall terminate.

4. Subject to the provisions of the foregoing paragraph, the district court shall retain jurisdiction to ensure that the arbitration proceeds without undue delay.

5. Because the injunction is ordered to preserve the jurisdiction of the district court and the Systems Adjustment Board under the Railway Labor Act, no bond will be required.

6. Each party is to bear its own costs.

It is so ordered. A written opinion will be filed as soon as practicable.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 87-5657

DC# CV-86-7921-JMI
Central California

IBTCWHA, LOCAL UNION NO. 2702,
Plaintiff-Appellant,

vs.

WESTERN AIR LINES, INC., *et al.*,
Defendants-Appellees.

ORDER

Before: SCHROEDER and POOLE, Circuit Judges

Plaintiff's emergency motion for expedited consideration of the appeal is construed as an emergency motion for an injunction pending appeal compelling arbitration so construed, the motion is granted.

The parties shall negotiate at the earliest possible time to select an arbitrator to decide the merits of the parties' disagreement over the interpretation of their collective bargaining agreement.

If the parties cannot agree within five days of the entry of this order upon an arbitrator, either party may request a list of available arbitrators from the National Mediation Board. The parties shall alternatively strike names from the list. The last remaining name shall be chosen to arbitrate the disputes. If that arbitrator is not available within 10 days of the date on which request is made to the National Mediation Board, the arbitrator on the list whose name was last struck shall be selected.

The parties shall proceed to arbitrate this matter pending this court's decision of the appeal.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 87-5667

DC# CV-86-8032
Central California

AIR TRANSPORT EMPLOYEES,
Plainfiff-Appellant,

vs.

WESTERN AIR LINES, INC.,
Defendant-Appellee.

ORDER

Before: SCHROEDER and POOLE, Circuit Judges

Appellant's emergency motion for an injunction pending appeal is granted. *See Lopez v. Heckler,* 713 F.2d 1432, 1435 (9th Cir.), *rev'd in part on other grounds,* 463 U.S. 1328, 464 U.S. 879 (1983).

The parties shall negotiate at the earliest possible time to select an arbitrator to decide the merits of the parties' disagreement over the interpretation of their collective bargaining agreements.

If the parties cannot agree within five days of the entry of this order upon an arbitrator, either party may request a list of available arbitrators from the National Mediation Board. The parties shall alternately strike names from the list. The last remaining name shall be chosen to arbitrate the disputes. If that arbitrator is not available within 10 days of the date on which request is made to the National

Mediation Board, the arbitrator on the list whose name was last struck shall be selected.

The parties shall proceed to arbitrate this matter pending this court's decision of the appeal.

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 86-7921 JMI (Px)

FILED
FEB 13 1987

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *et al.*,
Plaintiffs,

v.

WESTERN AIR LINES, INC., *et al.*,
Defendants.

ORDER DENYING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT; ORDER GRANTING DEFENDANTS' MOTION TO DISMISS FOR LACK OF JURISDICTION

This matter came regularly before the Honorable James M. Ideman, United States District Judge, for consideration. After full consideration of the moving and responding papers, and the file in the case, IT IS HEREBY ORDERED as follows:

1. Plaintiffs' Motion for Partial Summary Judgment is DENIED.

2. Defendants' Motion to Dismiss for lack of jurisdiction is GRANTED without prejudice.

It is the duty of the National Mediation Board (hereinafter "NMB") to investigate all disputes regarding employee representatives. 29 C.F.R. § 1203.2. In the present case, the dispute is between the carrier (Western) and the union (the employee representative). The Supreme Court

has held that the jurisdiction of the NMB over representation disputes under the Act is exclusive and the decisions of the NMB are representation matters and not subject to judicial review. *Switchman's Union v. National Mediation Board,* 320 U.S. 297, 64 S.Ct. 95, 98-100 (1943); *General Committee v. Missouri-Kansas-Texas Railroad,* 320 U.S. 323 (1943). Federal Courts may not intervene in a representation dispute but must disclaim jurisdiction and leave to the NMB, the protection of the conditions necessary to insure employee free choice. *Texador v. Suressa,* 590 F.2d 357 (1st Cir. 1978); *Aircraft Fraternal Association v. United Airlines, Inc.,* 406 F. Supp. 492 (N.D. Cal. 1976).

In the following cases, the Court dismissed the action since a representation issue was raised which was within the exclusive jurisdiction of the NMB. In *Airline Employees Associations v. Republic Airlines, Inc.,* 798 F.2d 967, 968 (7th Cir. 1986), *cert. denied,* 55 U.S.L.W. 3358 (November 18, 1986), the Court held that the union's action for expedited arbitration of a grievance and an injunction pending arbitration in a merger case raised representation issues. Similarly, in *Teamsters v. Texas International Airlines, Inc.,* 717 F.2d 157, 158 (5th Cir. 1983), the Court held that an action by a union seeking a declaration that its contract survived a merger raised an issue of representation.

Similarly, in the present case the union's action for an injunction and arbitration of a grievance in a merger, raises a representation issue. Therefore, the Court declines jurisdiction since representation disputes are within the exclusive jurisdiction of the NMB and are not subject to judicial review.

IT IS SO ORDERED.

DATED: 13 FEB 87

JAMES M. IDEMAN
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 86-8032 JMI (Bx)

FILED
FEB 13 1987

AIR TRANSPORT EMPLOYEES,

Plaintiffs,

v.

WESTERN AIR LINES, INC.,

Defendants.

ORDER DISMISSING THE ACTION FOR LACK OF JURISDICTION

This matter came regularly before the Honorable James M. Ideman, United States District Judge, for consideration. After full consideration of the file in the case, IT IS HEREBY ORDERED as follows:

1. The Court *sua sponte* dismisses the instant action for lack of subject matter jurisdiction, without prejudice. The Court finds that the present action raises a representation issue, which is within the exclusive jurisdiction of National Mediation Board (hereinafter "NMB").

2. On January 21, 1987, the Court issued an Order to Show Cause Re Dismissal, whereby the parties were instructed to respond to the Court's Order on or before January 28, 1987. However, the parties have failed to show cause as to why the action should not be dismissed. Accordingly, the Court declines jurisdiction since representation disputes are within the exclusive jurisdiction of the NMB and are not subject to judicial review.

IT IS SO ORDERED.

DATED: 13 Feb 87

JAMES M. IDEMAN
United States District Judge

APPENDIX G

SUPREME COURT OF THE UNITED STATES

No. A-716

WESTERN AIRLINES, INC., *et al.*,
Applicants,

v.

IBTCWHA, LOCAL UNION NO. 2702, *et al.*

ORDER

UPON CONSIDERATION of the application of counsel for the applicants,

IT IS ORDERED that the injunction issued by the United States Court of Appeals for the Ninth Circuit on March 31, 1987, case Nos. 87-5657 and 87-5667, be, and the same is hereby, stayed pending the timely filing and disposition of a petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay terminates automatically. In the event the petition for a writ of certiorari is granted, this stay shall continue pending the sending down of the judgment of this Court.

/s/ SANDRA DAY O'CONNOR
Associate Justice of the Supreme Court
of the United States

Dated this 1st
day of April, 1987

APPENDIX H

SUPREME COURT OF THE UNITED STATES

No. A-716

WESTERN AIRLINES, INC., *et al.*,
Applicants,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS AND AIR TRANSPORT EMPLOYEES

AMENDED ORDER

UPON CONSIDERATION of the application of counsel for the applicants,

IT IS ORDERED that the injunction and order compelling arbitration before the Systems Boards issued by the United States Court of Appeals for the Ninth Circuit on March 31, 1987, case Nos. 87-5657 and 87-5667, be, and the same are hereby, stayed pending the timely filing and disposition of a petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay terminates automatically. In the event the petition for a writ of certiorari is granted, this stay shall continue pending the sending down of the judgment of this Court.

/s/ SANDRA D. O'CONNOR
Associate Justice of the Supreme Court
of the United States

Dated this 2nd
day of April, 1987.

APPENDIX I

SUPREME COURT OF THE UNITED STATES

No. A-716

WESTERN AIRLINES, INC. AND DELTA AIR LINES, INC. *v.* INTERNATIONAL BROTHERHOOD OF TEAMSTERS AND AIR TRANSPORT EMPLOYEES

ON APPLICATION FOR STAY

[April 2, 1987]

JUSTICE O'CONNOR, Circuit Justice.

Applicants request that I issue a stay pending the filing and disposition of a petition for certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

The underlying dispute in this case involves the division of responsibility for regulation of collective bargaining between airlines and their employees under the Railway Labor Act, 45 U.S.C. §151 *et seq.* The Act defines three classes of labor disputes and establishes a different dispute resolution procedure for each. "Minor" disputes involve the application or interpretation of an existing collective-bargaining agreement. Minor disputes are subject to arbitration by a System Board of Adjustment. 45 U.S.C. §184. While courts lack authority to interpret the terms of a collective-bargaining agreement, a court may compel arbitration of a minor dispute before the authorized System Board.

"Major" disputes involve the formation of collective-bargaining agreements, and the resolution of such disputes is governed by §6 of the Act, 45 U.S.C. §§156, 181.

"Representation" disputes involve defining the bargaining unit and determining the employee representative for collective bargaining. Under §2, Ninth of the Act, the National Mediation Board has exclusive jurisdiction over representation disputes. 45 U.S.C. §152, 181.

Applicants, Western Airlines and Delta Air Lines, entered into an agreement and plan of merger on September 9, 1986. The merger agreement was approved by the United States Department of Transportation on December 11, 1986. On December 16, 1986, shareholder approval of the merger was conferred and Western Airlines became a wholly-owned subsidiary of Delta. On the morning of April 1, 1987, the merger of Western Airlines with Delta was scheduled to be completed. *See infra* at ___.

Respondents represented various crafts or classes of employees of Western Airlines. The Air Transport Employees (ATE) was designated by the National Mediation Board as the bargaining representative for a unit of Western employees consisting of clerical, office, fleet and passenger service employees. The International Brotherhood of Teamsters Local 2707 was the certified representative of three crafts or classes employed by Western: mechanics and related employees, stock clerks, and flight instructors. Each union's collective-bargaining agreement has a provision stating that the agreement shall be binding upon successors of the company.

Delta has substantially more employees than Western in the crafts or classes represented by the unions, and these Delta employees had no bargaining representative. Respondents filed grievances alleging that Western violated the successorship provisions of the two collective-bargaining agreements by failing to secure Delta's agreement to be bound by the collective-bargaining agreements between Western and respondent unions. Western refused to arbitrate the grievances, asserting that they necessarily

involved representation issues and therefore were within the exclusive jurisdiction of the National Mediation Board.

The unions filed separate complaints in the District Court for the Central District of California, each requesting the district court to treat the successor clause dispute as a minor dispute, and compel arbitration of the dispute by the System Adjustment Board. Both complaints were dismissed for lack of subject matter jurisdiction.

On March 17, 1987, the Court of Appeals for the Ninth Circuit entered an interim order directing arbitration of the grievances to proceed before the unions' respective System Adjustment Boards pending appeal.

At approximately 8:00 p.m. Eastern Time March 31—little more than 12 hours before the merger was scheduled to take place—the Court of Appeals for the Ninth Circuit issued the following order:

> "1. The judgments of the district court dismissing the unions' actions are reversed and the causes are remanded with instructions to enter orders compelling arbitration.
>
> "2. Western's motion for reconsideration of our order compelling arbitration pending appeal is denied.
>
> "3. The contemplated merger of Western Air Lines and Delta Air Lines is enjoined pending completion of arbitration proceedings or until Western and Delta file with the Clerk of this Court a stipulation that the result of the arbitration, subject to appropriate judicial review and all valid defenses, will bind the successor corporation. Upon filing of such stipulation and approval by the court, the injunction of the merger shall terminate.
>
> . . . . .
>
> It is so ordered. A written opinion will be filed as soon as practicable."

The timing and substance of the Court of Appeal's order under the exigencies of this case made compliance with Rule 44.4 of this Court, requiring that a motion for a stay first be filed with the court below, both virtually impossible and legally futile. I conclude that this situation presents one of those rare extraordinary circumstances in which request for a stay before the Court of Appeals is not required under the Rule.

I also conclude that the judgment of the Court of Appeals, reversing the district court decisions, requiring the entry of orders compelling arbitration, and enjoining the merger, is final within the meaning of 28 U.S.C. §2101(f). The Court of Appeal's provision for lifting the injunction upon certain stipulations of applicants does not divest the judgment of finality when, as in this case, the required stipulations, to have any significance, must bind applicants to a concession of their position on the only question before the Court of Appeals: whether the successor clause dispute is within the jurisdiction of the System Adjustment Board or the National Mediation Board.

Moreover, regardless of the finality of the judgment below, "a Circuit Justice has jurisdiction to vacate a stay where it appears that the rights of the parties to a case pending in the court of appeals, which case could and very likely would be reviewed here upon final disposition in the court of appeals, may be seriously and irreparably injured by the stay, and the Circuit Justice is of the opinion that the court of appeals is demonstrably wrong in its application of accepted standards in deciding to issue the stay." *Coleman v. Paccar, Inc.*, 424 U.S. 1301 (1976) (REHNQUIST, J., in chambers).

The reasoning of every other Court of Appeals that has ruled on the issue raised before the Ninth Circuit casts grave doubt on the validity of the Ninth Circuit's action in this case. The great weight of the caselaw supports the proposition that disputes as to the effect of collective-bar-

gaining agreements on representation in an airline merger situation are representation disputes within the exclusive jurisdiction of the National Mediation Board. In *International Brotherhood of Teamsters v. Texas International Airlines, Inc.*, 717 F. 2d 157 (CA5 1983), the Court of Appeals for the Fifth Circuit held that "[t]he [Railway Labor] Act commits disputes involving a determination of who is to represent airline employees in collective bargaining to the exclusive jurisdiction of the National Mediation Board." The Fifth Circuit stated, "A court may not entertain an action involving such a dispute even if it arises in the context of otherwise justiciable claims. Moreover, a court may not grant injunctive relief maintaining the status quo if the underlying dispute is representational in nature, because to do so would necessarily have the effect, at least during the period of the injunction, of deciding the representation issue." *Id.*, at 161. "Given the Mediation Board's undeniable sole jurisdiction over representation matters," and the practical problems of divided jurisdiction among the other dispute-resolution fora, the Fifth Circuit inferred "a congressional intention to allow that agency alone to consider the post-merger problems that arise from existing collective bargaining agreements." *Id.*, at 164. The Court of Appeals for the Seventh Circuit treated the question of National Mediation Board jurisdiction over alleged collective bargaining violations implicating post-merger representation as one settled by "the overwhelming and well-developed case law," and found "no reason to depart from the consistent and well-considered analysis of our colleagues in other circuits." *Air Line Employees v. Republic Airlines, Inc.*, 798 F.2d 967, 968, *cert. denied*, ___U.S. ___(1986). See also *Air Line Pilots Ass'n Int'l v. Texas Int'l Airlines*, 656 F. 2d 16 (CA2 1981); *International Ass'n of Machinists v. Northeast Airlines, Inc.*, 536 F. 2d 975, 977 (CA1), *cert. denied*, 429 U.S. 961 (1976); *Brotherhood of Ry. & S.S. Clerks v. United Air Lines, Inc.*, 325 F. 2d 576 (CA6 1963), *cert. dismissed*,

379 U.S. 26 (1964). It was upon this overwhelming body of caselaw that the District Court for the District of Columbia relied when it considered the complaint of the Association of Flight Attendants (AFA), also arising from the Western-Delta merger. AFA's complaint, seeking an order compelling Western to submit to arbitration by the System Board of Adjustment and enjoining the merger pending completion of proceedings before the System Board, was dismissed. *Association of Flight Attendants, AFL-CIO v. Western Airlines, Inc.*, No. 87-0040 (D DC February 20, 1987). On March 31, 1987 the Court of Appeals for the District of Columbia Circuit denied AFA's motions to compel arbitration pending appeal, and its motion for expedited appeal and decision before April 1. *Association of Flight Attendants, AFL-CIO v. Western Airlines, Inc.*, No. 87-7040. The Ninth Circuit's divergence from this line of Court of Appeals decisions leads me to find it very likely that at least four Justices would vote to grant certiorari, and that the applicant is likely to prevail on the merits.

To appreciate the balance of the equities created by the Ninth Circuit's order, one must focus on the stipulation clause of that order. What was to be gained or lost by the applicants and respondents in this case was not the merger of Western and Delta Airlines alone but the substance of the stipulation on which that merger was conditioned by the Ninth Circuit.

The stipulation which the Ninth Circuit required from Western and Delta Airlines is subject to two interpretations. The first is a requirement that Delta and Western agree that if, after full judicial review of the *jurisdictional* as well as other issues raised, it is determined that the claims presented by the respondents fall under the jurisdiction of the System Adjustment Board, the successor corporation will be bound by the result of the completed arbitration process. Under this interpretation of the stipulation, the successor corporation was required to do no

more than adhere to the obligations placed upon it by law, as those obligations are determined in the litigation. Those legal obligations, of course, would exist independent of any stipulation. If the stipulation would leave the applicants free to assert any of their arguments against the jurisdiction of the System Adjustment Boards, the applicants would have remained in the same position after the stipulation as they were before, and the stipulation would have served no purpose.

The other interpretation of the clause is that, in order to avoid an eleventh hour injunction of the merger, Delta and Western were required to stipulate as to the correctness of respondents' argument that this dispute *did* in fact fall under the jurisdiction of the Systems Adjustment Board. As to the balance of equities on this interpretation of the Ninth Circuit's order, they clearly weigh in favor of the applicants. The potential harm that would be suffered by applicants as a result of the Court of Appeals' injunction of their merger is seriously aggravated by the fact that the order issued on the very eve of the merger's consummation. For several months, applicants have been planning to combine their large-scale, complex, inter-related and heavily regulated operations effective April 1, 1987. That planning included the transfer, modification and cancellation of hundreds of Western's contracts for supplies and services and equipment leases. The approval of the Federal Aviation Administration of changes in Western's operating certificates, specifications and training programs have been sought and received. Maintenance schedules, flight schedules and staffing schedules have been modified in order to effect a smooth transition to a merged operation on April 1. Large numbers of Western management personnel, without whom it cannot operate as an independent entity, are to be severed effective April 1; many have presumably arranged for new employment. Delta has negotiated for transfer of Western's Mexican and Canadian routes with the respective governments of

those countries. It is doubtful that these arrangements can be undone if the merger does not take place as anticipated.

Because of the operational adjustments that are already in place, the FAA has expressed doubt whether Western will be permitted to continue operations should the merger not take place, potentially stranding thousands of travelers. Employees, expecting to be transferred to new locations after April 1, have sold old homes and bought or leased new ones. Changes in pay, working conditions, and conditions of employment all have been planned for and relied upon in anticipation of the merger. Millions of dollars of advertising have been targeted toward the April 1, 1987 merger date. And the list of consequences goes on. See Emergency Application for Stay and Vacation of Injunction, Affidavit of Hollis Harris and Exhibit 1 thereof; Affidavit of Robert Oppenlander; Affidavit of Russell H. Heil; Affidavit of Whitley Hawkins; Affidavit of C. Julian May; Affidavit of Jason R. Archambeau. The cost of enjoining this huge undertaking only hours before its long awaited consummation is simply staggering in its magnitude, in the number of lives touched and dollars lost. To assume that enjoining of the merger would do no more than preserve the "status quo," in the face of this upheaval, would be to blink at reality. Under the second interpretation of the stipulation clause—the only interpretation under which the required stipulations would have had meaning—applicants could prevent these losses only by conceding their argument, supported by the great weight of authority, that their dispute with respondents fell under the jurisdiction of the National Mediation Board. On the other side, respondents had no entitlement to such a concession, obtained under these circumstances, from parties that had otherwise indicated their intent to continue to assert the contrary position on the jurisdictional issue. Before the Court of Appeals the unions argued that completion of the merger would moot their claims under the collective-bargaining agreement to System Board ar-

bitration. For the reasons stated above, I doubt that respondents' claims would ultimately prevail. Moreover, preservation of respondents' claims could have been accomplished equitably by a speedier resolution of the jurisdictional issue, rather than by the inequitable last-minute foisting of a Hobson's choice on applicants. Finally, the employees themselves are protected by Delta's assumption of the Allegheny-Mohawk Labor Protective Provisions, requiring the continuation of certain fringe benefits, displacement and dismissal allowances for up to four to five years for employees who lose their jobs or get lesser-paying jobs, moving and related costs for employees required to move, integration of seniority lists and binding arbitration of any dispute relating to the labor protective provisions. See *Allegheny-Mohawk Merger Case,* 59 C. A. B. 22 (1971); Heil Affidavit, ¶6.

Because the stipulation upon which the lifting of the injunction was conditioned appears to be either unnecessary or extremely inequitable, depending upon its interpretation, and because it appears to me likely that at least four Justices would vote to grant certiorari and that the applicants are likely to prevail on the merits, I grant the requested stay of the Court of Appeals for the Ninth Circuit's injunction and order compelling arbitration before the Systems Boards, pending the timely filing and subsequent disposition of a writ of certiorari in this case.

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1986

No. 87-7040

ASSOCIATION OF FLIGHT ATTENDANTS, AFL-CIO,
Appellant,

v.

WESTERN AIRLINES, INC.

BEFORE: Mikva, Buckley and D.H. Ginsburg, Circuit Judges

FILED MAR 31 1987

O R D E R

Upon consideration of Appellant's Emergency Motion for Injunction To Compel Arbitration Pending Appeal and the Opposition and Response thereto and of Appellee's Emergency Motion For Expedited Appeal And Decision Before April 1, 1987, it is

ORDERED by the court that Appellant's motion to compel arbitration be denied. It is

FURTHER ORDERED by the court that Appellee's motion to expedite be denied.

APPENDIX K

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 87-0040

ASSOCIATION OF FLIGHT ATTENDANTS, AFL-CIO,
Plaintiff.

v.

WESTERN AIRLINES, INC.,
Defendant.

MEMORANDUM

This is a labor dispute which has arisen under the Railway Labor Act, 45 U.S.C. § 151 to 188 (1982) ("RLA"). It comes before the Court on plaintiff union's ("AFA") verified complaint and dispositive cross-motions. Defendant Western Air Lines, Inc. is scheduled to merge with Delta Air Lines, Inc. on April 1, 1987. Western's employees are represented by several different unions according to craft, including AFA. Delta is a non-union carrier. AFA claims that Western has breached its 1984 collective bargaining agreement with AFA by failing to bind Delta to the terms of that agreement.

FACTS

There are no material facts in dispute.

(1) On September 9, 1986, Western and Delta entered into an Agreement and Plan of Merger.

(2) On October 21, 1986, AFA filed a grievance over Western's failure to bind Delta to the 1984 collective bargaining agreement.

(3) On November 19, 1986, Western denied the grievance.

(4) On November 26, 1986, AFA submitted the dispute to Western's System Board of Adjustment pursuant to Section 24 of the collective bargaining agreement, and Western refused to arbitrate. Section 24(D), established under 45 U.S.C. § 184 of the RLA, provides for jurisdiction in the System Board over disputes "growing out of grievances or out of interpretation of application of any of the terms of the" collective bargaining agreement but "shall not extend to change in hours of employment, rates of compensation or working conditions . . . ."

(5) On December 11, 1986, the U.S. Department of Transportation gave final approval to the Agreement and Plan of Merger under the Federal Aviation Act.

(6) On December 18, 1986, as the first step looking toward merger, Delta acquired 100% control of Western and became its parent.

(7) On January 8, 1987, AFA filed its complaint with this Court. Western's motion to transfer the case to the U.S. District Court for the Middle District of California[1] was denied on January 20, 1987, and the motions now before the Court were promptly filed and opposed.

(8) In Section 5.9 of the Agreement and Plan of Merger, Delta and Western agreed that Western would continue to honor its 1984 collective bargaining agreement with AFA while it was a separate company under Delta's control. This has been done and there is no claim to the contrary. No layoffs are contemplated, either before or after the merger. If Western merges as planned into Delta on April 1, 1987, all Western flight attendants presently represented by AFA will become employees of Delta, supplementing and combining with Delta's much larger complement of flight attendants. Significantly higher wages and benefits will be paid flight attendants now represented

[1] Unions certified as representing Western employees engaged in other crafts are raising comparable issues there.

by AFA when they are Delta employees but, of course, they will be subject to Delta's own procedures, policies and rules governing flight attendants.[2]

(9) AFA's 1984 collective bargaining agreement with Western stated in Section 1(C):

> *This Agreement shall be binding on any* successor or *merged Company* or Companies, or any successor in the control of the Company, its parent(s) or subsidiary(ies) *until changed in accordance with the provisions of the Railway Labor Act, as amended.* (Emphasis added.)

The Contentions of the Parties

If the merger occurs on April 1, 1987, AFA's certification as the bargaining representative for flight attendants formerly employed by Western who become Delta employees will automatically be extinguished pursuant to the National Mediation Board's established policy.[3]

Characterizing the controversy as simply a "minor" dispute involving the proper interpretation of Section 1(C)[4] and therefore appropriate for resolution by Western's System Board of Adjustment, AFA contends that Section 1(C)

---

[2] In addition, Delta has voluntarily provided significant labor protective commitments to the Western flight attendants.

[3] Where two airlines are merged to form a single transportation system the National Mediation Board, to promote stable labor relations and remove problems of uneven representation, redundancy and confusion, considers the certification of all unions representing the employees of the acquired airline as extinguished on the date of integration. *See* Northwest Airlines, Inc., 13 N.M.B. 399, 400-01 (1986); Republic Airlines, Inc., 9 N.M.B. 49, 54-56 (1980). *See also* Air Line Employees Assoc., Int'l v. Republic Airlines, Inc., 798 F.2d 967, 968-69 n.4 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 458 (1986), International Bhd. of Teamsters v. Texas Int'l Airlines, Inc., 717 F.2d 157, 163 (5th Cir. 1983).

[4] *See* Elgin, J. & E. Ry. v. Burley, 325 U.S. 711, 723-25 (1945).

does not allow its collective bargaining agreement to be extinguished, but rather requires Western "to bind any successor or parent to that Agreement,"[5] by providing as a condition to merger that after the merger takes place Delta accept and be bound by the terms of AFA's 1984 collectively bargained agreement with Western.[6] AFA seeks an order from this Court directing Western to submit the issue to the System Board of Adjustment and asks the Court thereafter to retain jurisdiction to enforce compliance with any award the System Board makes against Western. If a prompt award is not made the Court is further requested to preserve the status quo by preventing the merger pending completion of proceedings before the System Board.

Western contends that the 1984 collective bargaining agreement is subject to change in accordance with requirements of the RLA as paragraph 1(C) states, noting that by operation of the RLA AFA's certification as the bargaining representative of Western employees must dissolve with the merger. It also contends that a fundamental question of post-merger representation is presented, and that since issues of representation are current and directly involved the System Board lacks jurisdiction under the RLA and the issues fall under the exclusive jurisdiction of the National Mediation Board.

Discussion

The situation presented by these conflicting positions is not one of first impression. Other federal courts have confronted similar labor disputes and their consistent recognition of the primary role of the National Mediation Board in resolving questions of representation has governed. Pursuant to the RLA, 45 U.S.C. §§ 155, 181 and 183, Con-

---

[5] Complaint, ¶ 17.

[6] Complaint, ¶ 18.

gress has clearly relegated all cases involving the representation of airline employees for collective bargaining purposes to the exclusive jurisdiction of the National Mediation Board. *See General Committee of Adjustment v. Missouri-K.-T. Ry.*, 320 U.S. 323, 335-38 (1943); *Switchmen's Union v. National Mediation Board*, 320 U.S. 297, 303-07 (1943); *International Brotherhood of Teamsters v. Texas International Airlines, Inc.*, 717 F.2d 157, 161-62 (5th Cir. 1983); *Air Line Pilots Association v. Texas International Airlines, Inc.*, 656 F.2d 16, 22-24 (2d Cir. 1981). *See also* 9 T. Khool, *Labor Law* § 50.07[2] (1986).

Where both representational issues and "minor" disputes which arguably may not involve representational issues are involved in a single dispute, it is not the role of a court to attempt to define such minor issues and require they be segregated for evaluation by the System Board. As a practical matter the issues inevitably overlap, and any attempt to divide jurisdiction between the System Board and the National Mediation Board would defeat the purposes of the RLA.[7] This is particularly true in merger situations where representational issues inevitably arise and it is "impossible to look only to the existence of a collective bargaining agreement and to isolate it from the other operational and representational matters." *International Brotherhood of Teamsters, supra.* 717 F.2d at 163. Thus, in cases presenting union challenges to airline mergers, "[w]here a representation dispute appears on the face of the complaint . . . the court is bound to dismiss the action." *Air Line Pilots Association, International, supra* 656 F.2d at 24 (citing Ruby v. American Airlines, Inc.,

---

[7] *See* International Bhd. of Teamsters, *supra*, 717 F.2d at 164 ("Given the [National] Mediation Board's undeniable sole jurisdiction over representation matters, we infer from the practical problems of divided jurisdiction a congressional intention to allow that agency alone to consider the post-merger problems that arise from existing collective bargaining agreements").

323 F.2d 248 (2d Cir. 1963) (Friendly, J.), *cert. denied*, 376 U.S. 913 (1964)).

There can be no question that the issue of post-merger representation is presented by this dispute. AFA itself recognized in its memorandum in support of summary judgment that a System Board arbitrator might bind Delta to the 1984 agreement "if it wants to proceed with an operational merger," or might otherwise take action that would require Delta, a non-party to the 1984 agreement, to set Western's flight attendants apart from Delta's flight attendants regardless of operational requirements.[8]

For AFA to characterize this as a minor dispute wholly within the province of the System Board ignores the reality of the situation and constitutes an attempt to circumvent procedures clearly mandated by Congress for resolution of disputes by the National Mediation Board under the RLA. *See, e.g., Air Line Employees Association, International v. Republic Airlines, Inc.*, 798 F.2d 967, 968-69 (7th Cir. 1986) (per curiam), *cert. denied*, 107 S. Ct. 458 (1986); *International Brotherhood of Teamsters, supra*, 717 F.2d at 160-61; *Air Line Pilots Association, International, supra*, 656 F.2d at 23-24.

Conclusion

AFA is entitled to no relief from this Court, and its motion for summary judgment is denied. Western is granted summary judgment and the complaint is dismissed with prejudice. An appropriate Order is filed herewith.

GERHARD A. GESELL
UNITED STATES DISTRICT JUDGE

February 20, 1987.

---

[8] Plaintiff's Memorandum at 25.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBI

Civil Action No. 87-0040

ASSOCIATION OF FLIGHT ATTENDANTS, AFL-CIO,
Plaintiff,

v.

WESTERN AIRLINES, INC.,
Defendant.

ORDER

Upon consideration of plaintiff's motion for summary judgment and defendant's cross-motion for summary judgment and the briefs and exhibits filed on each motion, for the reasons stated in a memorandum filed herewith, it is hereby

ORDERED that plaintiff's motion is denied; and it is further

ORDERED that defendant's cross-motion is granted, and plaintiff's complaint dismissed with prejudice; and it is further

ORDERED that each party shall bear its own costs.

GERHARD A. GESELL
UNITED STATES DISTRICT JUDGE

February 20, 1987

APPENDIX L

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NO. C-87-0402 MHP

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AIRLINE DIVISION, *et al.*,

Plaintiffs,

v.

PACIFIC SOUTHWEST AIRLINES, *et al.*,

Defendants.

ORDER DISMISSING COMPLAINT

This action under the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, arises out of Pacific Southwest Airlines' refusal to arbitrate alleged violations of four collective bargaining agreements (CBAs) reached between the airline and certain classes or crafts of its employees presently represented by the plaintiff union. The dispute centers on the imminent purchase of PSA by USAir, which intends to merge the operations of the two airlines. Although the explicit language of the disputed CBAs oblige PSA to incorporate into the terms of any merger agreement a number of provisions governing the post-merger employment of its workers, the acquisition agreement reached between PSA and USAir omits the stipulated terms. PSA refuses to arbitrate the union's grievance over the exclusion of the CBA's post-merger employment provisions. The union seeks an order compelling arbitration.

In defense of its refusal to arbitrate, PSA argues that the proposed terms required by the CBAs bear on the

determination of the appropriate labor representative for the post-merger workforce. PSA thus contends that it cannot be compelled to arbitrate the terms before its System Adjustment Board, given the National Mediation Board's exclusive jurisdiction over representational matters under the Railway Labor Act. PSA accordingly argues that the court must dismiss for lack of jurisdiction plaintiff's complaint seeking compulsory arbitration. Defendant USAir moves separately for dismissal on essentially the same jurisdictional grounds, though additionally arguing that plaintiff has failed to state a claim against it for which relief may be granted. Without reaching plaintiff's alleged failure to state a claim against USAir, the court finds that the terms of the collective bargaining agreement raise representational issues requiring the complaint to be dismissed in its entirety for lack of jurisdiction.

BACKGROUND

Plaintiff International Brotherhood of Teamsters, Airline Division, currently represents certain classes or crafts of employees of defendant Pacific Southwest Airlines (PSA) pursuant to the provisions of the Railway Labor Act, 45 U.S.C. § 151 *et seq.* In this capacity, the union is signatory to four collective bargaining agreements governing the rates of pay, rules, and working conditions of each represented class or craft. All four agreements expire on December 31, 1987. Among the provisions of the CBAs is language obliging PSA to incorporate into any subsequent merger agreement various terms governing the post-merger employment of its workers. These provisions provide, in pertinent part, as follows:

> The following protective provisions are applicable to mergers, consolidations and acquisitions of PSA operations and those of another carrier(s). The obligations contained herein are subject to the acts and obligations not being in violation of

the labor law as determined by statutes or courts of competent jurisdiction . . . .

A. In the event of a merger, consolidation or acquisition of or by PSA with another carrier . . . where the operation of the two carriers are to be integrated so as to create a single carrier within the meaning of the Railway Labor Act: . . . .

2. Where the majority of employees in the . . . class or craft of the post-merger carrier were employees of a carrier other than PSA . . . the following shall apply:

a. The consolidated, post-merger carrier shall assume the obligations of the IBT [International Brotherhood of Teamsters] Collective Bargaining Agreement, and shall maintain the agreement as to PSA employees represented by the Teamsters Airline Division prior to the merger until it is changed in accordance with Sections 2, 5, and 6 of the Railway Labor Act. The provisions of this Section shall not apply to the employees in the . . . class or craft of the post-merger carrier who are represented by an individual or labor organization other than the Teamsters . . . .

b. The consolidated, post-merger carrier shall recognize the Teamsters Airline Division as the representative of the employees in the post-merger . . . class or craft who were previously represented by the Teamsters . . . .

c. If the employees of the other carrier within the . . . class or craft are unrepresented, the post-merger carrier shall recognize the Teamsters . . . as the representative of all employees . . . if . . . the Union is able to present evidence of a ma-

> jority showing among all employees of the class or craft . . . .
>
> 3. The consolidated, post-merger carrier shall extend to PSA employees in the . . . class or craft, who were represented by the Teamsters . . ., labor protective provisions no less favorable [than those] in the Allegheny-Mohawk Merger Case . . . .
>
> 4. The facilities of PSA . . . shall not be integrated with the facilities of the other airline or entity involved in the merger . . . without agreement of the Teamsters . . . . The employees of PSA, as represented by the Teamsters . . ., shall not be integrated with employees of the other carrier . . . without agreement of the Teamsters . . . .
>
> C. PSA and/or PSA, Inc. agree that they will not enter into or execute any agreement of merger . . . without the language contained in this Section being incorporated into and made part of such merger . . . .

Griswold Affidavit, Exhibit 1 at Article 29; Exhibit 2 at Article 35; Exhibit 3 at Article 42; Exhibit 4 at Article 38.

On December 8, 1986, PSA accepted an offer by USAir to purchase PSA and merge the airline with its own operations. On January 28, 1987, the Department of Transportation tentatively approved the merger agreement. Final shareholder approval of the merger is anticipated at the next corporate meeting of defendant PSA, scheduled for mid-March 1987. After the acquisition, USAir intends to operate PSA as a wholly-owned subsidiary for some time prior to merging the operations of the two airlines. During this period, PSA will continue to honor and operate under the terms of the current CBAs negotiated by plaintiff

union. George Declaration, ¶ 5. Upon the subsequent merger of the two carriers, USAir has indicated that it will provide PSA employees with Allegheny-Mohawk labor protection provisions. George Declaration, ¶ 9. Nonetheless, the terms of the acquisition agreement between PSA and USAir do not include the specific provisions stipulated by PSA's collective bargaining agreements regarding the post-merger employment of its workers, and USAir has conditioned its purchase on the exclusion of such terms.

PSA currently employs approximately 900 workers in its "mechanic and related employees" craft or class. These employees are represented by the plaintiff Teamsters. USAir currently employs approximately 2,300 workers in its "mechanic and related employees" craft or class. These employees are represented by the International Association of Machinists. PSA currently employs approximately 850 workers in its "flight attendant" class or craft, all of whom are represented by plaintiff union. USAir employs approximately 2,600 workers in its "flight attendant" craft or class, all of whom are represented by the Association for Flight Attendants. PSA also employs approximately 2,000 workers in a combined "fleet and passenger service employees" craft or class, represented by the plaintiff Teamsters. USAir has no parallel craft or class certification. Of the approximately 6,450 USAir workers in fleet and passenger service positions, 1,700 are represented by the Teamsters while the balance have not selected a collective bargaining representative.

DISCUSSION

Labor relations in the airline industry are governed by the provisions of the Railway Labor Act, 45 U.S.C. § 151 *et seq.* Under the act, disputes between employers and employees are classified as either minor, major, or representational. *Int'l Bhd. of Teamsters v. Texas Int'l Airlines, Inc.*, 717 F.2d 157, 158 (5th Cir. 1983). Minor disputes involve disagreements over the interpretation of

the terms of existing collective bargaining agreements; major disputes involve disagreements over the formation of such agreements; and representational disputes involve the determination of the employee representative for purposes of collective bargaining and other aspects of employer-employee relations. *Id.*

Under the statute, a different mechanism exists for the resolution of each type of dispute. Minor disputes are committed to an arbitration process before a system board of adjustment, which is the mandatory and exclusive forum for the resolution of such disagreements. 45 U.S.C. § 184. Representational disputes, governed by section 2, Ninth of the Railway Labor Act, are committed to the exclusive jurisdiction of the National Mediation Board (NMB), which is empowered to investigate disputes and certify the appropriate labor representative. 45 U.S.C. § 152, Ninth; *Switchmen's Union of N. Am. v. Nat'l Mediation Bd.*, 320 U.S. 297 (1943). While a court lacks the authority to interpret the terms of a collective bargaining agreement, it can act on a complaint to compel arbitration of a minor dispute before the authorized board of system adjustment. *Int'l Ass'n of Machinists v. Central Airlines, Inc.*, 372 U.S. 682, *reh'g denied*, 373 U.S. 947 (1963). When faced with a complaint implicating representational issues, though, a court cannot intercede and is obliged to dismiss the action for lack of jurisdiction in deference to the National Mediation Board's exclusive dominion over the field of employee representation. *Air Line Employees Ass'n, Int'l v. Republic Airlines, Inc.*, 798 F.2d 967, 969 (7th Cir.), *cert. denied*, ___U.S. ___, 107 S. Ct. 458 (1986).

The plaintiff union attempts to characterize the present dispute as a minor disagreement over the interpretation and application of an existing collective bargaining agreement, and thus seeks an order to compel arbitration of its grievance before the System Adjustment Board. Defendant PSA argues conversely that while the dispute arises in the context of contractual language, the disputed

terms bear directly on the determination of the appropriate labor representatives for the post-merger carrier's employees. The defendant therefore argues that the complaint must be dismissed for lack of jurisdiction.

While the classic representational dispute involves a disagreement between two unions or a group of employees and a union over the determination of an appropriate collective bargaining representative, an overt conflict is not required to raise a representational issue. "A representation dispute may occur even if only one union claims to represent the employees if there is a question whether a majority of the craft or class desires the union's representation. Representation disputes include issues whether two related carriers will be treated as one for representation purposes, and whether a craft or class must be systemwide or may be split for representation purposes." *Int'l Bhd. of Teamsters v. Texas Int'l Airlines, Inc.*, 717 F.2d at 159. Thus in the context of mergers, courts have held consistently that although disputes over the interpretation and continuing effect of existing collective bargaining agreements may appear contractual on their face, and may pit a union only against the employer or its members, such disputes must be left to the execlusive authority of the National Mediation Board if question of post-merger representation are implicated.[1] *Bhd. of Railway and Steam-*

---

[1] Plaintiff attempts to rebut the weight of this authority with the holding of courts interpreting section 301 of the Labor Management Relations Act, 29 U.S.C. § 185. *See, e.g., John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964), *Howard Johnson Co., Inc. v. Detroit Local Joint Exec. Bd.*, 417 U.S. 249 (1974); *Amalgamated Clothing and Textile Workers Union v. Ratner Corp.*, 602 F.2d 1363 (9th Cir. 1979). The significant differences between the Labor Management Relations Act and the Railway Labor Act, though, make plaintiff's comparison purely obfuscatory. Section 301 empowers courts to interpret and enforce contractual agreements in a manner wholly unauthorized under the Railway Labor Act, which defines for courts a far more deferential and limited role in its implementation. *See Air Line Pilots Ass'n, Int'l v. Transamerica Airlines, Inc.*, 615 F. Supp. 371, 375 (N.D. Cal. 1985).

ship Clerks v. United Air Lines, Inc., 325 F.2d 576, 579 (6th Cir. 1963), *cert. denied*, 377 U.S. 903, *cert. dismissed*, 379 U.S. 26 (1964); *Int'l Bhd. of Teamsters v. Texas Int'l Airlines, Inc.*, 717 F.2d at 158; *Air Lines Employees Ass'n, Int'l v. Republic Airlines, Inc.*, 798 F.2d at 968; *Int'l Ass'n of Machinists v. Northeast Airlines, Inc.*, 536 F.2d 975, 977 (1st Cir.), *cert. denied*, 429 U.S. 961 (1976); *see Air Line Pilots Ass'n, Int'l v. Texas Int'l Airlines, Inc.*, 656 F.2d 16, 18 (2d Cir. 1981).

There is no question that this dispute raises post-merger representational issues over which the court has no jurisdiction. The terms of the collective bargaining agreements which plaintiff seeks to enforce bear directly on the post-merger representation of employees of both PSA and USAir. Since the disputed terms arise in the context of contractual language prospectively obliging PSA to assure the inclusion of certain terms in any subsequent merger agreement, the provisions do not purport to directly govern the post-merger employment and representation of any employee. Nonetheless, courts have consistently held that such terms effectively deny the National Mediation Board's sole jurisdiction over representation matters.[2] Courts therefore have refused to compel arbitration over the failure of an acquired or acquiring employer to give effect to CBA language purporting to bind successors to existing representational provisions, insofar as the disputed contractual terms effectively raise post-merger representational issues falling outside the courts' jurisdiction. *Bhd. of Railway and Steamship Clerks*, 325 F.2d at 577; *Ass'n of Flight Attendants v. Western Airlines, Inc.*, No. 87-0040, slip op. (D.D.C. February 20, 1987). The instant action is

---

[2] The collective bargaining agreements here in dispute explicitly acknowledge that the disputed language must be subordinated to the requirements of the law: each states that its provisions regarding post-merger employment and representation are to be given effect only insofar as they are not "in violation of the labor law as determined by statutes or courts of competent jurisdiction."

indistinguishable from these cases; while the disputed language here is more explicitly binding than the successorship language there challenged, both would unambiguously require the same representational obligations if given effect.[3]

The two cases cited by plaintiff which purportedly contradict this interpretation are clearly distinguishable. One is a decision by the court in *Ass'n of Flight Attendants v. Republic Airlines, Inc.*, No. 86 C 3164, slip op. (N.D. Ill. June 11, 1986), rendered prior to the completion of Republic's merger with Northwest Airlines. There the plaintiff union brought an action to compel Republic to arbitrate its alleged noncompliance with a provision of its CBA requiring it to assure that Allegheny-Mohawk labor protection provisions be included in any subsequent merger agreement. The court held that the dispute was arbitrable. The holding is critically distinguishable from the case at bar insofar as there was no post-merger representation issue on the face of the complaint; labor protection provisions, not post-merger representational arrangements, were in dispute. To the extent, though, that the court stated without authority and in dicta that it "should not and need not reach out and consider whether or not the ordering of arbitration will somehow impact the representation of all the flight attendants after the merger," the comment flatly contradicts the long and consistent line of precedent requiring courts to look beyond the face of a complaint in search of representational issues disguised as arbitrable contract disputes. As the court stated in *Bhd. of Railway and Steamship Clerks*, "[l]ooking through form to substance, we agree with the District Court that, al-

---

[3] In an action to compel arbitration involving extremely analogous facts and equally explicit agreement provisions, Judge Ideman recently dismissed for lack of jurisdiction a complaint before him filed by the plaintiff in this action. *Int'l Bhd. of Teamsters v. Western Air Lines, Inc.*, No. CV 86-7921 JMI (Px), slip op. (C.D. Cal. February 13, 1987).

though the suit is cast in the form of an action under the law of contracts, it in fact involves a representation dispute. Even though an action is brought as one sounding in contract the courts have no jurisdiction 'where validity of the contract depends upon the merits of a representation dispute.' " 325 F.2d at 579.

The other case relied upon by plaintiffs, *Air Line Pilots Ass'n, Int'l v. Texas Int'l Airlines, Inc.*, 567 F. Supp. 56 (S.D. Tex. 1983); is also distinguishable. The grievance on which the union sought to compel arbitration was based strictly on a successor clause in the context of a corporate reorganization, rather than a merger involving multiple unions. At least on its face, the complaint in that action did not allege representational issues. To the extent that representational issues were implicated, this court respectfully disagrees with the holding and chooses to follow the predecessor case in the Second Circuit involving the same dispute, *Air Line Pilots Ass'n, Int'l v. Texas Int'l Airlines, Inc.*, 656 F.2d at 16. In the Second Circuit case the complaint made reference to representational issues. Despite the union's characterization of the issue as whether the employer could avoid provisions of the collective bargaining agreement by forming another company and transferring its operations to it, the court held that the complaint sought resolution of a representational dispute and was within the exclusive jurisdiction of the NMB.

Plaintiff insists that this is a pre-merger case and that the court should look only at the pre-merger side of the transaction. The union argues that it is merely seeking to enforce contract provisions with PSA. Thus, it claims, the arbitrator will not be required to decide representational issues but only restrain PSA from completing the merger until it has complied with particular terms of the collective bargaining agreement. The particular terms it seeks to enforce are clearly representational in nature.

The line plaintiff seeks to construct between pre-merger and post-merger activity is not so bright. Although the merger has not closed, the dispute contemplates post-merger representation in its clearest form. The complaint is not ambiguous about that. In another pre-merger case, *Ass'n of Flight Attendants v. Western Airlines, Inc.*, No. 87-0040, slip op., the court was faced with the same problem; it reached the same result as this court does, concluding that to treat the matter as a minor dispute "ignores the reality of the situation and constitutes an attempt to circumvent procedures clearly mandated by Congress for resolution of disputes by the National Mediation Board under the RLA." Slip op. at 7. Other pre-merger cases agree. *See Air Line Employees Ass'n, Int'l v. Republic Airlines, Inc.*, 798 F.2d at 967 (finding exclusive jurisdiction in the NMB in a case where the merger had been approved by the Department of Transportation, but was not yet effective at the time the action was filed); *Int'l Bhd. of Teamsters v. Western Airlines, Inc.*, No. CV 86-7921 JMI (Px), slip op. (C.D. Cal. February 13, 1987). The effort to craft the terms of the agreement to avoid NMB jurisdiction is of no avail. It is clear that the purport of the disputed provisions is to determine representation which is strictly within the jurisdiction of the NMB.

Examination of the specific provisions which plaintiff seeks to enforce reveals that each inarguably raises post-merger representational issues beyond the court's jurisdiction. First, in those classes or crafts where USAir employees have already designated a representative other than the Teamsters, the Teamsters seek to enforce CBA terms upon the post-merger carrier which explicitly require that the Teamsters continue as the designated representative for PSA employees whom it now represents. Thus in the flight attendant and mechanic classes, where the employees of USAir have designated unions other than the Teamsters as their labor representative, enforcement of the disputed terms of the CBAs would require the frag-

mentation of labor representation within classes or crafts of the post-merger carrier.

This effect clearly contravenes the policy of the National Mediation Board to certify representatives on a systemwide basis, and infringes upon its exclusive jurisdiction over the determination of "whether a craft or class must be systemwide or may be split for representation purposes." *Texas Int'l Airlines*, 717 F.2d at 159. As the court in *Texas Int'l Airlines* observed,

> [t]he Mediation Board has itself adopted the rule that, upon a merger of two airlines, "all certifications . . . were extinguished by operation of law." *Republic Airlines, Inc. and Hughes Air Corp.*, 8 NMB 49 (1980). In reaching this conclusion, the Board noted that permitting certifications to survive a merger would lead to "uneven representation, duplication of effort, and confusion." 8 NMB at 54. It would reduce the ability of airlines to integrate operations and to maintain a single system. 8 NMB at 55 . . . . One clerk would have a union representative; two of his neighbors would be unrepresented. One employee's working conditions and grievance procedures would be governed by a collective bargaining agreement; two of his neighbors would not. We defer to the Board's rationale, based on the Board's expertise and the statutory delegation of authority to it, to determine disputes concerning who are the representatives of the carrier's employees.

717 F.2d at 163. Thus to compel the parties to arbitrate a CBA provision requiring the certification of plaintiff Teamsters to represent a minority fraction of employees in certain post-merger classes or crafts clearly would trespass upon representational matters solely within the jurisdiction of the National Mediation Board. *See also Bhd.*

of Railway and Steamship Clerks, 325 F.2d at 579 ("If the District Court had exercised jurisdiction in this case and had granted the relief sought in the complaint, such a determination clearly could have applied to no more than the 2700 former Capital employees, constituting a minority of this class or craft of appellee's employees, 530 of whom are now represented by the International Association of Machinists. Such an impracticable result demonstrates the soundness of the holding . . . that there is to be no judicial intervention in such representation disputes.")[4]

Second, the Teamsters seek to compel arbitration to enforce terms of the CBAs requiring that the Teamsters

---

[4] Plaintiff argues that labor representatives can be certified on a less than systemwide basis if the employer volu "arily consents to the arrangement. "Nothing in federal labor law precludes a successor from voluntarily assuming, as part of its acquisition arrangements, the obligations of labor agreements, including recognition of the union." Plaintiff's Memorandum at 24. It is clear, though, that USAir will not voluntarily recognize post-merger labor representatives on a less than systemwide basis within any given craft or class; plaintiff admits as much by seeking to *compel* the defendants to abide by such an arrangement. Therefore, since the issue raised is not what an employer can voluntarily agree to but rather what an employer can be compelled to do, plaintiff's argument is misplaced. *See Summit Airlines, Inc. v. Teamsters Local Union No. 295*, 628 F.2d 787, 795 (2d Cir. 1980) ("It does not follow, however, that because Summit could recognize Local 851 voluntarily, the Union may, upon Summit's refusal to do so, ignore section 2, Ninth .... The legislative history reflects a preference for classwide representation ....") The holding in *Burlington Northern, Inc. v. The American Ry. Supervisors Ass'n*, 503 F.2d 58 (7th Cir. 1974), *cert. denied*, 421 U.S. 975 (1975), is not contrary. There the court held that a successor who voluntarily assumed and abided by the collective bargaining provisions of an acquired entity, who subsequently repudiated the assumed agreement because the bargaining unit was less than systemwide, could be compelled to arbitrate the enforceability of its agreement with the unit. Here USAir, the acquiring entity, has not voluntarily assumed the obligations of the prior agreement, and in fact expressly refuses to do so. This posture can hardly be characterized as a voluntary and binding recognition analogous to that in *Burlington Northern*.

be designated the representative of all post-merger employees in those classes or crafts where USAir employees have not designated a collective bargaining representative, and where PSA employees have selected the plaintiff union. This provision would affect a large number of employees in the fleet and passenger service areas, where USAir employees have not yet certified a collective bargaining representative and where the plaintiff currently represents PSA employees. Again, there can be no question that this provision implicates representational issues solely within the jurisdiction of the National Mediation Board. While the disputed provision of the CBAs requires the Teamsters to demonstrate majority support within one year of the merger to maintain its representation status, the provision nonetheless predetermines the collective bargaining representative for classes or crafts of the post-merger carrier within which a majority of employees have never selected representation. This baldly excludes the National Mediation Board from a process over which it has exclusive authority, and thus cannot be placed before a system board of adjustment for arbitration as a minor dispute.

Finally, the Teamsters seek to enforce a number of substantive provisions regarding the post-merger employment of PSA workers, including the integration of the airlines' facilities and seniority lists, the continued application of the existing collective bargaining agreements, and the extension of Allegheny-Mohawk labor protection provisions to PSA employees.[5] While these provisions less explicitly implicate representational issues than those discussed above, they nonetheless fall beyond this court's jurisdiction to compel arbitration. As the court in *Int'l Bhd. of Teamsters v. Texas Int'l Airlines, Inc.*, stated with respect to

---

[5] USAir has indicated that it will provide Allegheny-Mohawk labor protection provisions to PSA employees. It is unclear whether the union nonetheless seeks to arbitrate a grievance with respect to the provision of such protections.

the continued application of a collective bargaining agreement, "[t]he continuance in force of . . . [the] agreement, however, inevitably entailed not only the enforcement [of its provisions] but also the requirement that the Company bargain with the Union concerning those matters . . . . Thus, the Union has an indispensable role in administering the agreement . . . . Continuation of the contract in force unavoidably constitutes a determination of employee representation . . . ." 717 F.2d at 161. Significantly, the CBA terms purporting to govern the post-merger integration of the two airlines' facilities and seniority lists explicitly require the involvement and approval of the plaintiff union.

To the extent that any of these matters are entirely divorced from representational issues, though, and actually do constitute minor disputes, it is inappropriate for the court to attempt to distribute the issues between the National Mediation Board and the System Adjustment Board. As Judge Gesell observed,

> [w]here both representational issues and "minor" disputes which arguably may not involve representational issues are involved in a single dispute, it is not the role of a court to attempt to define such minor issues and require they be segregated for evaluation by the System Board. As a practical matter the issues inevitably overlap, and any attempt to divide jurisdiction between the System Board and the National Mediation Board would defeat the purposes of the RLA. This is particularly true in merger situations where representational issues inevitably arise and it is "impossible to look only to the existence of a collective bargaining agreement and to isolate it from the other operational and representational matters."

(citations omitted) *Ass'n of Flight Attendants v. Western Airlines, Inc.*, No. 87-0040, slip op. at 5-6; *see also Texas*

Int'l Airlines, 717 F.2d at 164. Thus "as soon as the action reveals a representation dispute, the court is required to dismiss the complaint." *Air Line Pilots Ass'n, Int'l v. Texas Int'l Airlines, Inc.*, 656 F.2d at 23.

ACCORDINGLY, since this complaint raises representational issues over which the court has no jurisdiction, the action is dismissed with prejudice.

IT IS SO ORDERED.

DATE: MAR 20, 1987

MARILYN HALL PATEL
MARILYN HALL PATEL
United States District Judge

APPENDIX M

STATUTORY MATERIAL

I. Railway Labor Act, Section 2, Fourth; 45 U.S.C. § 152, Fourth

Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purpose of this chapter. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: Provided, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

II. Railway Labor Act, Section 2, Ninth; 45 U.S.C. § 152, Ninth.

If any dispute shall arise among a carrier's employees as to who are the representatives of such employees des-

ignated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

III. Railway Labor Act, Section 201; 45 U.S.C. § 181

All of the provisions of subchapter I of this chapter except Section 153 of this title are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such

carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.